No. 88-2018-CSY
Status: GRANTED

Title: Illinois, Petitioner
v.
Edward Rodriguez

Docketed:
June 5, 1989

Court: Appellate Court of Illinois,
First District

Counsel for petitioner: Madsen,Terence M., Goldfarb,Renee

Counsel for respondent: Curran,Christine P.

Apr. 5, 1989-Sup. Ct. IL den lv to appeal NOTE: S
28.2 re dock dt-Due June 4, 1989-SUN.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jun 5 1989 | G | Petition for writ of certiorari filed. |
| 2 | Jul 12 1989 | | DISTRIBUTED. September 25, 1989 |
| 3 | Aug 2 1989 | F | Response requested -- BRW. |
| 4 | Aug 28 1989 | | Order extending time to file response to petition unti September 30, 1989. |
| 5 | Sep 29 1989 | | Brief of respondent Rodriguez in opposition filed. |
| 6 | Oct 4 1989 | | REDISTRIBUTED. October 27, 1989 |
| 7 | Oct 30 1989 | | Petition GRANTED. |
| | | | ********** |
| 8 | Nov 13 1989 | | Record filed. |
| | | * | Certified copy of original record received. |
| 10 | Dec 4 1989 | | Order extending time to file brief of petitioner on th merits until December 22, 1989. |
| 11 | Dec 4 1989 | G | Motion of respondent to supplement the record filed. |
| 12 | Dec 4 1989 | | DISTRIBUTED. DEC. 8, 1989. (MOTION OF RESPONDENT TO SUPPLEMENT THE RECORD). |
| 13 | Dec 11 1989 | | Motion of respondent to supplement the record GRANTED. |
| 14 | Dec 14 1989 | | Brief amicus curiae of California filed. |
| 16 | Dec 15 1989 | | Brief amici curiae of Americans for Effective Law Enforcement, et al. filed. |
| 15 | Dec 18 1989 | | Joint appendix filed. |
| 17 | Dec 22 1989 | | Brief amicus curiae of United States filed. |
| 18 | Dec 22 1989 | | Brief of petitioner Illinois filed. |
| 19 | Jan 3 1990 | | Supplemental Record filed. (Per order of Court dated December 11, 1989). |
| 20 | Jan 5 1990 | G | Motion of the Solicitor General for leave to participat in oral argument as amicus curiae and for divided argument filed. |
| 21 | Jan 16 1990 | | Motion of the Solicitor General for leave to participat in oral argument as amicus curiae and for divided argument GRANTED. |
| 23 | Jan 22 1990 | | Order extending time to file brief of respondent on the merits until February 1, 1990. |
| 24 | Jan 26 1990 | | SET FOR ARGUMENT TUESDAY, MARCH 20, 1990. (2ND CASE) |
| 26 | Jan 31 1990 | | Brief of respondent filed. |
| 25 | Feb 1 1990 | | Brief amicus curiae of National Association of Criminal Defense Lawyers filed. |
| 27 | Feb 15 1990 | | CIRCULATED. |
| 28 | Mar 3 1990 | X | Reply brief of petitioner Illinois filed. |

No. 88-2018-CSY

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 29 | Mar 20 1990 | | ARGUED. |

88-2018



NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

---

STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

---

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
THIRD DIVISION**

NEIL F. HARTIGAN,
Attorney General
State of Illinois
TERENCE M. MADSEN,
Assistant Attorney General
100 West Randolph Street,
Suite 1200
Chicago, Illinois 60601

Attorneys for Petitioner.

CECIL A. PARTEE
State's Attorney
County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
INGE FRYKLUND,*
PAUL GLIATTA,
Assistant State's Attorneys
Of Counsel.

*Counsel of Record.

54 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether a police officer's good faith reliance on a third party's apparent authority to permit a consensual entry is a valid exception to the warrant requirement of the Fourth Amendment?

2. Whether the Illinois Appellate Court misinterpreted United States v. Matlock, in holding that there was no actual authority to permit a consensual entry?

## TABLE OF CONTENTS

II.

## TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

---

STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT THIRD DIVISION**

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Appellate Court, of Illinois, First Judicial District, Third Division, which was entered on January 11, 1989.

## OPINION BELOW

The order of the Appellate Court of Illinois, First Judicial District, Third Division, is reproduced in Appendix A to this Petition.

## JURISDICTION

The order and judgment of the Appellate Court of Illinois, First Judicial District, Third Division, were entered on January 11, 1989. On April 5, 1989, the Illinois Supreme Court denied a Petition for Leave to Appeal. This Petition for a Writ of Certiorari is filed within 60 days of that date. United States Supreme Court Rule 20(1). The decision of the Appellate Court of Illinois, First Judicial District, Third Division was explicitly based on federal constitutional law, in particular on the Fourth and Fourteenth Amendments. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution - Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Fourteenth Amendment.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Defendant Edward Rodriguez, was charged by information with possession of cannabis and possession of more than 30 grams of substance containing cocaine with intent to deliver. (R. 165) After a hearing on defendant's motion to quash arrest and suppress evidence before the Honorable James M. Schreier, the court granted defendant's motion. (R. 138-142)

On July 26, 1985, at approximately 2:30 p.m., Officers James Entress and Ricky Gutierrez of the Chicago Police Department, arrived at 3554 South Wolcott in response to a call from Officer Tenza. (R. 3-4) Officer Entress testified that when he arrived at 3554 South Wolcott, he and Gutierrez were met by Officer Tenza. (R. 5) They determined that a woman, Gale Fisher, had

been the victim of a battery, and that her mother, Dorothy Jackson was the owner of the house at 3554 South Wolcott. (R. 5-6) Officer Entress indicated that Gale Fisher had a swollen jaw, black eye and bruises on her neck. (R. 33) Officer Entress testified that while in the presence of the other officers and Dorothy Jackson, Gale Fisher stated that earlier that day, Edward Rodriguez had beaten her at their apartment at 3519 South California. (R. 5-6) Officer Entress further testified that Gale Fisher kept using the words "our" and "their" when referring to the apartment at 3519 South California. (R. 27-28) Gale Fisher stated that defendant was still at the apartment, that she had the key and would allow the officers entry to make the arrest. (R. 10, 27)

After this conversation, Gale Fisher, Dorothy Jackson and the officers proceeded to 3519 South California in order to effectuate defendant's arrest. (R. 28) When they arrived at 3519 South California, Gale Fisher took out the key, opened the front door and allowed the officers to enter. (R. 28-29) The officers placed defendant under arrest and seized tupperware containing a white powder substance which was later determined to be cocaine. (R. 29) The officers also seized pipes, scales and other drug paraphernalia which, like the cocaine, were all in plain view. (R. 29-31)

Dorothy Jackson, Gale Fisher's mother, testified to substantially the same facts as Officer Entress regarding the events of July 25, 1985. (R. 36-62) Dorothy Jackson further testified that the apartment at 3519 South California was Gale's home and

that Gale referred to it as "our apartment" when she spoke to the police on July 25th. In addition, Dorothy Jackson testified that on July 1, 1985, Gale and her two daughters began to stay with her on a temporary basis. (R. 39-43) Dorothy Jackson further testified that the reason her daughter had come to stay with her was because defendant wanted her away until their baby was bottle broken and potty trained. (R. 42) Dorothy Jackson also stated that on July 1, 1985, she drove Gale to 3519 South California to pick up some clothes. (R. 40-41) Although Gale took three bags of clothes, she left behind her furniture, stove refrigerator and personal items at 3519 South California. (R. 41)

Gale Fisher testified that she had known defendant for approximately two and a half years, and that she, along with her children, lived with him at 3519 South

California from December of 1984 through June of 1985. (R. 73-74) Gale Fisher further testified that although she moved into her mother's house on July 1, 1985, except for three bags of clothes, everything she owned remained at the 3519 South California apartment. (R. 73-79) In addition, Gale Fisher testified that between July 1, 1985 and July 26, 1985 she saw defendant at 3519 South California almost every day. (R. 79) Furthermore, she indicated that during that same period she probably slept the night there on occasion. (R. 74-80) As a result of the beating on July 26, 1985, Gale Fisher admitted that she had sustained a broken jaw. (R. 80) Finally, Gale Fisher testified that from July 1, through July 26, 1985, she did not have a key to the apartment at 3519 South California. (R. 86) She indicated that she had taken the key on July 26, 1985 without

defendant's knowledge. (R. 86) However, at the preliminary hearing which took place on September 11, 1985, Gale Fisher testified that defendant had given her the key to the apartment at 3519 South California. Furthermore, at trial, Gale Fisher admitted that she was afraid of defendant. (R. 92) Gale Fisher also admitted that she let the officers in using the key to the apartment at South California.

Based on the evidence which was adduced at the hearing on defendant's motion to suppress, the trial court found that Gale Fisher lacked actual authority to consent to the police entry. Furthermore, the court did not reach the issue of whether Gale Fisher had apparent authority to consent due to the fact that Illinois does not recognize this doctrine. Thus, the trial court granted defendant's motion to suppress.

On appeal by the State, the Appellate Court, First Judicial District, Third Division, affirmed the trial court's finding on both the issue of actual authority and apparent authority. The State then petitioned for leave to appeal to the Illinois Supreme Court. This petition was subsequently denied.

## REASON FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

### I.

CONTRARY TO THE VAST MAJORITY OF JURISDICTIONS, THE ILLINOIS APPELLATE COURT HAS MISINTERPRETED THE FOURTH AMENDMENT BY REFUSING TO RECOGNIZE A VALID EXCEPTION TO THE WARRANT REQUIREMENT WHENEVER A POLICE OFFICER, IN GOOD FAITH, RELIES ON A THIRD PARTY'S APPARENT AUTHORITY TO PERMIT ENTRY INTO THE HOME.

The Appellate Court of Illinois, First Judicial District, Third Division incorrectly interpreted the Fourth Amendment when it refused to recognize that a police officer's good faith reliance on a third party's apparent authority to give consent to enter can be a valid exception to the warrant requirement.

In reaching its decision in People v. Rodriquez, No. 86-2887, the Illinois Appellate Court, First Judicial District, Third Division has decided an important question of federal law, namely, whether the good faith reliance of the police on a third party's apparent authority to give consent to entry is a valid exception to the warrant requirement of the Fourth Amendment. In rejecting this doctrine, the Illinois Appellate Court chose to ignore the lead of some thirty other states and several federal circuit courts of appeal which have already embraced this doctrine. Undoubtedly, this issue is one of great magnitude, in that it is a situation frequently confronted by law enforcement officers at all levels throughout the country. Since this Court has never ruled on this issue, the People of the State of Illinois respectfully ask this Court to

give both the State and Federal Courts its guidance on this important issue.

The Appellate Court held that the trial court properly granted defendant's motion to quash arrest and suppress evidence. In reaching this conclusion, the Appellate Court recognized that the law in Illinois does not allow for an apparent authority to consent doctrine. In light of the growing trend which exists in various jurisdictions towards an acceptance of this doctrine, the People of the State of Illinois respectfully request this Honorable Court to embrace this doctrine. Indeed, it appears that the trial court itself was extremely reluctant to grant defendant's motion to suppress. The trial judge stated:

> "What the Illinois reviewing court would decide today based on the United

States Supreme Court cases cited by the State holds some doubt, leave the question perhaps somewhat open, a crack in the door. But I think I am obliged to follow the present situation in Illinois which would not allow for police to act on the apparent authority of the person allowing the search of an apartment, the person this case being Gale Fisher. Maybe that will change. It might change tomorrow ... I invite the State to make new law, which I think would be new in terms of the apparent authority. ...."

Besides Illinois, Oregon is the only State to continue to resist adoption of the apparent authority to consent doctrine. See: State v. Carsey, 295 Or. 32, 664 P.2d 1085 (1983). Indeed, a review of the law shows that every other State to decide this

issue has adopted this doctrine.[1]

---

[1] Alaska (Nix v. State, 621 P.2d 1347 (Alaska, 1981)); Arizona (State v. McGann, 132 Ariz. 296, 645 P.2d 811 (1982)); Arkansas (Spears v. State, 270 Ark. 331, 605 S.W.2d 9 (1980)); California (People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955)); See: People v. Jacobs, 43 Cal. 3d 472, 729 P.2d 757 (1987) (en banc); Colorado (People v. Berow, 688 P.2d 1123 (1984)); District of Columbia (Jackson v. United States, 404 A.2d 911 (D.C. App. 1979)); Florida (Flanagan v. State, 440 So. 2d 13 (Fla. App. 1983)); Massachusetts (Commonwealth v. Wahlstrom, 375 Mass. 115, 375 N.E.2d 706 (1978)); Michigan (People v. Gary, 150 Mich. App. 446, 387 N.W.2d 877 (1986)); See: People v. Wagren, 114 Mich. App. 541, 320 N.W.2d 251 (1982)); Nevada (Snyder v. State, 103 Nev. Adv. Ops. No. 60, 738 P.2d 1303 (1987)); New Jersey (State v. Miller, 159 N.J. Super. 552, 388 A.2d 993 (1978)); South Dakota (State v. No Heart, 353 N.W.2d 43 (S.D. 1984)); Washington (State v. Christian, 26 Wash. App. 542, 613 P.2d 1199 (1980)), Affd., 95 Wash. 2d 655, 615 P.2d 806 (1981). In addition, several Federal Circuit Courts of Appeals have also adopted this doctrine. They include United States v. Peterson, 524 F.2d 167 (4th Cir. 1985); United States v. Sells, 496 F.2d 912 (7th Cir. 1975); See: United States v. Miller, 800 F.2d 129 (7th Cir. 1986); United States v. Hamilton, 792 F.2d 837 (9th Cir. 1986); See: United States v. Miles, 480 F.2d 1217 (9th Cir. 1973).

In People v. Adams, 53 N.Y.2d 1, 439 N.Y.S.2d 877, 422 N.E.2d 537 (1981), cert. denied, 454 U.S. 854, the New York Court of Appeals specifically adopted the apparent authority to consent doctrine. In Adams, defendant, although wounded in a gun-battle with the police, managed to flee the scene. At this point a woman, Arah Blue approached the police and identified herself as defendant's girlfriend. She gave the police defendant's name, told them defendant had threatened her, and escorted the police to defendant's apartment. Once at the apartment, Arah Blue opened the door with a key she was carrying. A search of the apartment revealed that defendant was in possession of a rifle and ammunition. The New York of Appeals upheld the denial of defendant's motion to suppress. The Court stated:

"We would agree that where the searching officers rely in good faith on the apparent capability of an individual to consent to a search and the circumstances reasonably indicate that the individual does, in fact, have the authority to consent, evidence obtained as the result of such a search should not be suppressed. Application of the exclusionary rule in such instances of reasonable, good faith reliance by the police would do little in terms of deterring misconduct by the authorities in furtherance of the protections afforded by the Fourth Amendment. We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching

officers. Moreover, a warrantless search will not be justified merely upon a bald assertion by the consenting party that they possess the requisite authority. Nor may the police proceed without making some inquiry into the actual state of authority when they are faced with a situation which would cause a reasonable person to question the consenting party's power of control over the premises or property to be inspected. In such instances, bare reliance on the third party's authority to consent would not be reasonable and would, therefore, subject any such search to the strictures of the exclusionary rule." Id. at 541.

While it is clear that adoption of the apparent authority to consent doctrine

represents the growing trend across the country, there are compelling reasons which would justify its adoption by this Court. First, the underlying basis of these decisions is fundamentally sound. In a situation such as the case at bar, where the police acted reasonably and in good faith, the purpose of the exclusionary rule is in no way served by excluding evidence. The purpose of the exclusionary rule is to deter police misconduct. Adopting the apparent authority to consent doctrine implicates none of the dangers which the exclusionary rule was designed to protect against. Indeed, in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), this Court implied its approval of the apparent authority to consent doctrine by allowing the "good faith" exception into Fourth Amendment jurisprudence. In light of this Court's

decision in Leon, the People of the State of Illinois maintain that the Illinois Appellate Court's ruling on this issue is in short, an incorrect interpretation of the Fourth Amendment. The Appellate Court was guided in its decision by People v. Vought, 174 Ill. App. 3d 563, 528 N.E.2d 1095 (2nd Dist. 1988)[2] and People v. Bochniak, 93 Ill. App. 3d 575, 417 N.E.2d 722 (1st Dist. 1981), two cases which specifically rely on People v. Miller, 40 Ill. 2d 154, 238 N.E.2d 407 (1968), cert. denied 393 U.S. 961.

In Miller, the Illinois Supreme Court declined to adopt the apparent authority to consent doctrine. In that case,

---

[2] People v. Vought, (88-1796) involves issues similar to those presented in the case at bar. A petition for a writ of certiorari was filed in that case on May 12, 1989.

the defendant was arrested at a private home where he was employed to care for a bed-ridden invalid. At the time of arrest, the police obtained the consent of the home owner to search defendant's automobile which was in the garage. The Illinois Supreme Court found the consent invalid and ordered that all evidence resulting from the search would be suppressed. The People submit that in Miller, the police officer's reliance on the home owner's consent would not have been reasonable under an apparent authority to consent doctrine. The police could have easily checked the license plate number to determine the automobile's true owner. In the case at bar, the police officers were faced with a much different situation. Here, the officers encountered a woman who had obviously just been brutally beaten. Her jaw was subsequently determined to be broken.

Gale Fisher told the police that defendant had beaten her, that defendant was at their apartment and that she had the key. Further, she stated that she would allow the police to enter in order to effectuate the arrest. Based on these factors, the police officers acted reasonably in relying on Gale Fisher's apparent authority to consent. While the police officers in Miller had the option to check the license plate number of defendant's automobile, the police in this case had no easy method to determine whether Gale Fisher truly had the necessary authority to consent. Should the police have required Gale Fisher to produce a copy of her lease at this point? Under Miller, the answer to this question is "yes." This result illustrates the fallacy of the underlying reasoning of Miller, and further shows the reason so many jurisdictions have adopted the apparent authority to consent doctrine.

Thus, in Miller, the Illinois Supreme Court expressed its disapproval of the propriety of recognizing the importance of a police officer's good faith reliance. Under current constitutional principles, the People maintain that the Appellate Court's interpretation of the Fourth Amendment in this area is an untenable position which is simply incorrect. The People also note that the Illinois Appellate Court's ruling leads to dissimilar results. Since the Seventh Circuit Court of Appeals has recognized this doctrine, See United States v. Miller, 800 F.2d 129 (7th Cir. 1986), if the charges in the case at bar had been brought by the United State's Attorney's Office for the Northern District of Illinois, an opposite result would have been reached. This illustrates both the magnitude of the Appellate Court's misinterpretation of the

Fourth Amendment and the urgency with which the People of the State of Illinois come before this Honorable Court.

## II.

**THE ILLINOIS APPELLATE COURT MISINTERPRETED THE FOURTH AMENDMENT AND UNITED STATES V. MATLOCK IN HOLDING THAT GALE FISHER LACKED ACTUAL AUTHORITY TO PERMIT A CONSENSUAL ENTRY.**

The Appellate Court held that since Gale Fisher lacked the actual authority to consent to the entry by the police at the apartment at 3519 South California, defendant's motion to suppress was properly granted. The People maintain that the Appellate Court erred in affirming the trial court's grant of defendant's motion to suppress, where at the time Gale Fisher consented to allow the police to enter the apartment at 3519 South California, she possessed actual authority to grant that consent.

While the Appellate Court properly looked to the rule as set out by this Court in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), the People of the State of Illinois maintain that the Appellate Court erred in its application of Matlock.

First, the trial court based its finding that Gale Fisher lacked actual authority to consent on the fact that 3519 South California was not her exclusive residence. While this is a factor to be considered, it is not controlling. In addition, the People maintain that the apartment at 3519 South California was Gale Fisher's exclusive permanent residence. Gale Fisher testified that she had lived there exclusively from December of 1984 until July 1, 1985. The People submit that when Gale Fisher moved temporarily into her mother's

house on July 1, 1985, 3519 South California remained both her exclusive and permanent residence. Indeed, her mother, Dorothy Jackson, testified that her daughter had taken only three bags of clothes with her, and that her daughter had moved in only on a temporary basis due to her husband's irritation with the baby. Furthermore, besides the three bags of clothes, evry other worldly possession that Gale Fisher owned remained at the apartment at 3519 South California. Also, Gale Fisher admitted this fact at the hearing on defendant's motion to suppress. The People note that this is a factor which the Appellate Court dismissed during its analysis. This fact clearly shows that the Appellate Court's conclusion that Gale Fisher was an infrequent visitor, guest, or invitee and thus lacked authority to consent was erroneous.

The Appellate Court further observed that Gale Fisher testified at the suppression hearing that she had stolen the key. While this testimony might or might not be relevant to determining actual authority (she also testified that she was afraid of defendant), this issue only illustrates the difficulty of using actual rather than apparent authority as a guide for police officers who must make on the street judgments. This testimony came only months after the arrest. How far must an officer question, when faced with an injured citizen the legitimacy of her possession of a key? In addition, nothing in the record establishes that defendant's claim to the apartment was superior to Gale Fisher's or to any other persons's. Especially in a day of fluid living arrangements, actual authority may be a very elusive concept and one quite

unsuited to the exigencies of the situation. Apparent authority, on the other hand, can be assessed and reviewed on the basis of information known to the officer at the time of entry.

## CONCLUSION

For all the reasons discussed herein, a writ of certiorari should issue to review the decision of the Illinois Appellate Court.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General
State of Illinois
TERENCE M. MADSEN,
Assistant Attorney General
100 West Randolph Street,
Suite 1200
Chicago, Illinois 60601

Attorneys for Petitioner.

CECIL A. PARTEE
State's Attorney
County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
INGE FRYKLUND,*
PAUL GLIATTA,
Assistant State's Attorneys
Of Counsel.

*Counsel of Record.

**APPENDIX A**

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

vs.

EDWARD RODRIGUEZ,

Defendant-Appellee.

---

**ORDER**

The defendant, Edward Rodriguez, was arrested on July 26, 1985, and charged with possession of a controlled substance with the intent to deliver. He was charged on the basis of certain items of physical evidence seized during a warrantless search of his apartment that was conducted pursuant to the consent of a third-party. The trial

court granted defendant's motion to quash his arrest and suppress evidence, holding that the party who consented to the entry into defendant's apartment was without authority to do so. The State appeals from this order questioning whether consent to enter was properly given.

The trial court heard defendant's motion to suppress evidence on the grounds that the party who consented did not have the authority to consent because she was not living at defendant's apartment at the time that she consented to the entry. At the hearing, Officer James Entress testified that on July 26, 1985, at about 2:30 p.m. he and his partner, Officer Ricky Gutierrez, received a call from Officer Tenza asking for assistance at a residence located at 3554 South Wolcott. Upon arriving, Officer Entress had a conversation with Gale Fisher.

Also present during this conversation were Officer Tenza, Officer Gutierrez, and Dorothy Jackson (Fisher's mother). Fisher told Officer Entress that earlier in the day defendant had beaten her at their apartment at 3519 South California and that she wanted to make a complaint. She also indicated that she had been living at that apartment, that her clothes and furniture were in that apartment, that defendant was presently asleep there, and that she had a key to the apartment and would let the officers enter to arrest defendant. During direct examination, Officer Entress acknowledged that he had testified at a preliminary hearing that Fisher had told him that she used to live at the apartment on South California. However, he went on to say that it was his impression that she was still living there at the time she agreed to let them into the apartment.

Officer Entress testified that during his conversation with Fisher he told her that they would only arrest defendant if Fisher was certain that she wanted to press charges against him, and that she seemed hesitant about signing a complaint. Having recalled a conversation with someone a year earlier concerning the involvement of an individual named Edward Rodriguez with narcotics, Officer Entress asked Fisher if defendant was involved with narcotics and Fisher would not respond to that question. Officer Entress testified that he, Officer Gutierrez, Fisher and her mother proceeded to the apartment on South California. Fisher opened the door with her key and allowed the officers to enter. Officer Entress first entered the living room where he observed containers of a substance he believed to be cocaine and drug paraphernalia including pipes and scales. He

then proceeded to the bedroom where he observed defendant sleeping on a bed. In the course of waking defendant, Officer Entress saw two open briefcases at the side of the bed that contained a white substance that he believed to be cocaine. Defendant was subsequently arrested. On cross-examination, Officer Entress testified that Fisher used the term "our" and "their" when referring to the apartment on South California.

Dorothy Jackson testified that on July 1, 1985, she drove her daughter to the apartment on South California at the latter's request so that she could remove her clothes from the apartment. She removed several bags of clothing and left behind her stove, refrigerator and some furniture. Ms. Jackson testified that her daughter told her that she was staying with her because defendant wanted one of their two children toilet trained.

She stated that since there was no agreement that Fisher and the children would stay with the witness, Fisher would have to return to her apartment on South California after the child was trained. According to Ms. Jackson, her daughter and her children stayed with Jackson from July 1 through July 26, 1985. During that time Fisher visited defendant and, on approximately two or three occasions, spent the night at his apartment. She also stated that the apartment on South California was Ms. Fisher's home. In the afternoon of July 26, Fisher went to Ms. Jackson's house and told her that defendant had beaten her, whereupon Ms. Jackson telephoned the police and Officer Tenza arrived a few minutes later.

Fisher testified that she lived with defendant at the apartment on South California from December 1984 through June

1985, and that she moved in with her mother on July 1, 1985. When she moved in with her mother, she left the key at defendant's apartment. She stated that she did not have a key to defendant's apartment from July 1 to July 26 and that defendant would let her into the apartment when she went to visit him during that time. She did take a key from defendant's dresser on July 26, after she and defendant had argued. During July 1985 she never had any friends at the apartment on South California, she only went there to visit defendant, and she never went there when defendant was not in the apartment. According to Fisher, she did not remove her stove, refrigerator and furniture that her name was not on the lease and that defendant always paid the rent on the apartment. Fisher stated that although she did tell Officer Entress that she had a key to the

apartment and agreed to let him inside, she also indicated that she did so because the police told her that that is what she had to do if she wanted to press charges. She denied telling Officer Entress on July 26 that she was living in the apartment on South California.

Our review of the trial court's decision to grant defendant's motion to suppress, recognizes that its ruling will not be set aside unless clearly erroneous. (People v. White (1987), 117 Ill. 2d 194, 512 N.E.2d 677.) We note at the outset that this case involves a consent to enter and not a consent to search, and that case law regarding third party consent commonly involves consent to search. However, the concept of consent to search is fundamentally intertwined with the concept of consent to enter since the validity of a warrantless

seizure of evidence in plain view depends on the validity of the entry by the officers seizing the evidence. Therefore, the application of that case law to the instant case is both proper and relevant. In determining whether Fisher had the authority to consent to the warrantless search of defendant's apartment, we are guided by the rule set forth in United States v. Matlock, (1974), 415 U.S. 164, 171, 39 L.Ed.2d 242, 94 S.Ct. 988, which involved a consent to search. In that case, the United States Supreme Court ruled that "when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other significant relationship to the

premises or effect sought to be inspected." The Supreme Court explained the term "common authority" as follows:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, * * * but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed that risk that one of their number might permit the common area to be searched." United States v. Matlock, (1974), 415 U.S. 164, 171, n.7.

The Illinois Supreme Court adopted this common authority doctrine for cases involving third-party consent in People v. Stacey (1974), 58 Ill. 2d 83, 317 N.E.2d 24. In that case the defendant's wife who was jointly occupying a house with the defendant, allowed police to remove a shirt from defendant's dresser drawer that was located in their bedroom. The court concluded that the mere fact that the defendant alone may have used a dresser drawer while his wife may have used another did not indicate that the wife was denied the mutual use, access to or control of the drawer.

The application of this doctrine requires a determination as to whether the consenting party had sufficient common authority to consent to the entry of the premises where the evidence was found in

plain view. (People v. Callaway, (1988), 167 Ill. App. 3d 872, 522 N.E.2d 337); People v. Posey (1981), 99 Ill. App. 3d 943, 426 N.E.2d 209.) The third-party consent to enter must be made from a person who has control over the premises. (People v. Daugherty (1987), 161 Ill. App. 3d 394, 514 N.E.2d 228.) In reviewing the record in the instant case, we note that the trial court properly rejected the State's contention that Fisher had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority. (People v. Vought (1988), 174 Ill. App. 3d 563, 528 N.E.2d 1095); People v. Bochniak (1981), 93 Ill. App. 3d 575, 417 N.E.2d 722. We also agreed with the trial

court's finding that Fisher lacked sufficient authority to justify the police action because under the common authority doctrine set out in Matlock her consent was not valid. In reaching its determination the trial court mentioned the following factors established by the evidence as controlling: (1) Ms. Fisher's name was not on the lease and she did not contribute to the. rent; (2) defendant's apartment was not her exclusive or even her usual place of residence, rather, she was an infrequent visitor, guest or invitee; (3) she did not have access to the apartment when defendant was not there and, like a guest, she only had access when defendant was present; (4) she never brought people over to the apartment; and (5) she moved her clothes, and more importantly, her children to her mother's residence. All of these factors indicate that Fisher did not

have the common authority over the defendant's apartment that was necessary to make her consent to enter valid. The fact that the evidence seized was in plain view does not change the outcome of this case because the plain view doctrine is dependent upon an original lawful entry (People v. Patrick (1981), 93 Ill. App. 3d 830, 417 N.E.2d 1056), and we have held the evidence does not contravene the conclusion that the original entry was unlawful. Therefore, the trial court's decision to grant defendant's motion to suppress was proper.

For the reasons set forth above, the judgment of the circuit court is affirmed.

Judgement affirmed.

FREEMAN, P.J., with Mcnamara and WHITE, JJ., concurring.

NO. 88-2018

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

---

STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

---

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT THIRD DIVISION

---

JAMES W. REILLEY*
*(Counsel of Record)
2720 River Road
Suite 134
DesPlaines, Illinois
60018
(312) 299-8870

Attorney for
Respondent

CHRISTINE P. CURRAN
Attorney at Law
2720 River Road
Suite 134
Chicago, Illinois 60018
Of Counsel

28 pp

## QUESTION PRESENTED FOR REVIEW

I

Whether the Illinois Appellate Court has correctly interpreted the Fourth Amendment by Requiring that a third party have actual authority to consent to a warrantless entry of a home.

II

Whether the Illinois Appellate Court correctly interpreted Federal law in holding that Gale Fisher lacked actual authority to consent to the warrantless entry of the respondent's apartment.

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Statutes and Rules

NO. 88-2018

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

---

STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

---

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT THIRD DIVISION

---

Respondent, EDWARD RODRIGUEZ, respectfully prays that Petitioner's Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District, Third Division, be denied.

## OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, Third Division is attached to the Petition for

Writ of Certiorari to the Appellate Court of Illinois, First Judical District, Third Division, as Appendix A.

## JURISDICTION

The Statement of Jurisdiction stated by the Petitioner is adequate.

## STATEMENT OF THE CASE

The Petitioner's statement of the case is adequate and acceptable to the Respondent.

## REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

### I

### THE ILLINOIS APPELLATE COURT HAS CORRECTLY INTERPRETED THE FOURTH AMENDMENT BY REQUIRING THAT A THIRD PARTY HAVE ACTUAL AUTHORITY TO CONSENT TO A WARRANTLESS ENTRY OF A HOME.

The Illinois Appellate Court correctly interpreted the Fourth Amendment when it refused to recognize the existence of a "good faith exception" to the warrant requirement when a police officer enters a person's home in reliance upon the consent of a third party. Moreover, the decision of the Illinois Appellate Court is supported by an adequate and independent state ground.

In United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974), this Court held that the Fourth Amendment requires that a third party may consent to the

search of a residence only when that person has actual authority to do so.

The Petitioner claims that United States v Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) permits a "good faith" exception to the Matlock rule, so that a third party with mere apparent authority may consent to a warrantless police entry. Leon does not, either expressly or by implication, approve the notion of apparent authority to consent. The holding in Leon was that when a police officer, in good faith, has obtained a search warrant from a neutral and detached magistrate and acted within its scope, evidence thereby obtained should not be suppressed. 468 U.S. at 920-21. The underlying rationale of Leon is that there is no police illegality when officers rely on a finding of probable cause by a magistrate; the deterrence aspect of the

exclusionary rule would therefore not be served by suppression.[1]

The rationale of Leon does not apply where, as here, there exists no good faith reliance by police officers on a warrant issued by a neutral and detached magistrate. In fact, the officers made no attempt to secure a warrant or corroborate information provided by Gail Fisher. There are no objective facts upon which the officers could in good faith believe that Ms. Fisher has authority to consent to the entry. Thus, the deterrence aspect of the exclusionary rule is served by suppression

---

[1]The affidavit in Leon did not establish probable cause because the information contained therein was fatally stale and the affidavit failed to establish the informant's credibility. 468 U.S. at 905-06.

in the instant case.[2]

Assuming, arguendo, that this Court chooses to adopt the apparent authority exception to the warrant requirement, the facts presented here do not permit the conclusion that the officers reasonably believed that Gail Fisher had the authority to consent to the search. The officers responded to a call to proceed to Mrs. Jackson's home, rather than the defendant's. There is no evidence that any of the five officers so much as asked Ms. Fisher if she ever resided at the California apartment. She was never asked

---

[2]Petitioner's reliance on United States v. Miller, 800 F.2d 129 (7th Cir. 1986) as authorizing the apparent authority exception is likewise misplaced. Although Miller in dicta vaguely refers to apparent authority, the holding was that a third party, by the defendant's actions, had actual authority to act as a custodian of records for purposes of complying with a subpoena to disclose such records. 800 F.2d at 135.

whether her name was on the lease. Officer Entress stated that "I didn't go into specifics with her as if she just moved out or anything like that." (R.10) At the preliminary hearing, Officer Entress testified that Ms. Fisher told him she "used to live there."

Officer Entress made no effort to learn whose name the apartment was in. (R.15) He admitted that he could not determine from his conversation with Ms. Fisher whether she was living in the apartment every day. (R.28) Officer Entress concluded that Ms. Fisher resided at the defendant's home merely because that was the site of the alleged battery. (R.12) A sound application of the apparent authority doctrine should require that police make reasonable inquiries to determine the third party's relationship to the area searched. The record here is

totally devoid of any efforts on the part of the police to determine Ms. Fisher's status vis-a-vis the defendant's apartment. (R.13) Under these facts, the Petitioner's claim of "good faith" and "reasonable belief" must fail. The Petitioner's reliance on People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537 (1981), cert. denied, 454 U.S. 854, therefore proves too much. In adopting the apparent authority doctrine, the Adams court warned:

> We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers. Moreover, a warrantless search will not be justified merely upon a bald assertion by the consenting party that they possess the requisite authority. Nor may the police proceed

> without making some inquiry into the actual state of authority when they are faced with a situation which would cause a reasonable person to question the consenting party's power of control over the premises or property to be inspected. In such instances, bare reliance on the third party's authority to consent would not be reasonable and would, therefore, subject any such search to the strictures of the exclusionary rule."

422 N.E.2d at 541.[3]

Regardless of the current state of federal law, the decision of the Illinois Appellate Court is supported by an independent and adequate state ground, so

---

[3]The Petitioner's claim that the adoption of apparent authority by other state courts mandates that this Court hold likewise is without merit where, as here, there exists both Federal and Illinois law to the contrary.

that this case does not present a proper occasion to consider whether to modify federal law requiring actual authority to consent. It is a basic principle of federal jurisprudence that "this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). See also Minnesota v. National Tea Co., 309 U.S. 551, 558 (1940); Henry v. Mississippi, 379 U.S. 443, 446 (1965). Any modification of the actual authority doctrine would violate basic principles of comity and federalism. This Court recognised in Cooper v. California, 386 U.S. 58 (1967) that a State may impose higher standards on searches and seizures than that required by the Federal Constitution if it so chooses. See also People v. Jackson, 116 Ill.App.3d

340, 452 N.E.2d 85 (1983).

In this case, the decision of both the trial court and appellate court is firmly grounded on Illinois law. In rejecting the State's apparent authority argument the trial court stated:

> In terms of the officers' relying on the apparent authority theory, with the support of People versus Adams, an out of state case, can be instructive if there is no controlling Illinois case. And there does seem to be a controlling Illinois case in People versus Miller.
>
> What the Illinois reviewing courts would decide today based on the United States Supreme Court cases cited by the State holds some doubt, leaves the question perhaps somewhat open, a crack in the door. But I think I am obliged to follow the present situation in Illinois which would not

allow for police to act on the apparent authority of the person in allowing the search of an apartment, the person in this case being Gayle Fisher. Maybe that will change. It might change tomorrow.

The present state of the law does not allow for it and Adams can only be instructive and I think can only really be acted on and adopted by a reviewing court and not by the trial court, given the fact that there are Illinois reviewing court opinions on the subject.

(R.16-17)

Despite the trial court's "invitation", the Illinois Appellate Court chose to adhere to the Illinois case law rejecting the apparent authority argument:

> In reviewing the record in the instant case, we note that the trial court properly rejected the State's con-

> tention that Fisher had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority.

People v. Rodriguez, Slip Op. at 12.[4]

The Illinois courts have a long history with regard to the actual authority doctrine. The "joint right of access" test enunciated by this Court in Matlock in 1974 had already been the law in Illinois for several decades. See, e.g. People v. Walker, 34 Ill.2d 23, 213 N.E.2d 552 (1966); People v. Shambley, 4 Ill.2d 38, 122 N.E.2d 172 (1954). Moreover, the

---

[4]The decision of the Illinois Appellate Court is found in Appellant's Appendix A.

Illinois reviewing courts continue to reject the notion of "apparent authority" despite recent repeated attempts to the contrary. In the instant case, the Illinois Supreme Court declined review when one of the issues presented was "apparent authority". In People v. Miller, 40 Ill.2d 154, 238 N.E.2d 407 (1968) the Illinois Supreme Corut specifically rejected the State's claim that a search was reasonable merely because a third party had apparent authority to consent. The apparent authority argument was also rejected in People v. Vought, 174 Ill. App.3d 563, 528 N.E.2d 1095 (1988) (now on Petition for Certiorari before this Court, filed May 12, 1989) and People v. Bochniak, 93 Ill. App.3d 575, 417 N.E.2d 722 (1981).

To reach the issue of apparent authority this Court must first agree with the Illinois Appellate Court that

Petitioner has failed to show actual authority. However, once this issue is decided, the evidence must be suppressed because controlling Illinois case law mandates that consent searches be supported by actual authority. Thus, the modification of the actual authority doctrine would contravene settled law prohibiting this Court from issuing merely advisory opinions in which there is no genuine case or controversy. Herb v. Pitcairn, 324U.S. 117, 125-26 (1945). Because of the Illinois tradition of actual authority, this case does not present an appropriate occasion for Review by Certiorari.

II

THE ILLINOIS APPELLATE COURT CORRECTLY INTERPRETED FEDERAL LAW IN HOLDING THAT GALE FISHER LACKED ACTUAL AUTHORITY TO CONSENT TO THE WARRANTLESS ENTRY OF THE RESPONDENT'S APARTMENT.

The Illinois Appellate Court held that Gale Fisher did not possess actual authority to consent to the warrantless entry of Respondent's apartment. This decision, affirming the trial court, is clearly supported by Illinois and Federal case law and is therefore not properly subject to review by this Court.

This Court defined the guidelines for third party consent searches in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974). The Matlock rule requires that the third party offering consent have common authority in and have an equal right of access to the premises:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

415 U.S. at 172, n.7, (citations omitted).

The Illinois Appellate Court correctly applied the Matlock "joint right

of access" test to the facts presented in this particular case:

> The application of this doctrine requires a determination as to whether the consenting party had sufficient common authority to consent to the entry of the premises ...

People v. Rodriguez, Slip. op. at 11. The Appellate Court relied on the following factors to find that Gale Fisher lacked the common authority over the premises to validly consent to the search:

> (1) Ms. Fisher's name was not on the lease and she did not contribute to the rent; (2) defendant's apartment was not her exclusive or even her usual place of residence, rather, she was an infrequent visitor, guest or invitee; (3) she did not have access to the apartment when defendant was not there and, like a guest, she only had access

when defendant was present; (4) she never brought people over to the apartment; and (5) she moved her clothes, and more importantly, her children to her mother's residence.

People v. Rodriguez, Slip. Op. at 13.

The Petitioner maintains that the Illinois Appellate Court erred in its application of Matlock yet cites no specific ground for this contention. It appears that the Petitioner is merely proposing an interpretation of the facts other than that reached by the Illinois courts. In other words, the Petitioner's second argument is really a claim of "insufficient evidence" -- a ground that has never presented an appropriate subject for review by Certiorari by this Court. See United States Supreme Court Rule 17.

Moreover, the facts in the instant

case permit only one conclusion -- that Ms. Fisher lacked the right of joint access to the defendant's home that is necessary for a valid consent under Matlock. Gail Fisher was not even a co-occupant of the California apartment. Officer Entress testified that Ms. Fisher had a key to the apartment and said that she "had" been living there. (R.10) However, on cross examination, Entress stated that he didn't know from this conversation whether Ms. Fisher was living at the apartment every day. (R.28) He gave the following version at the preliminary hearing:

> Q. Did Gail Fisher tell you she lived at 3510 South California?
> A. She stated she used to live there.

(R.10-11).

Mrs. Jackson agreed that Ms. Fisher moved into her home on July 1, 1985. (R.36)

The two later returned to the California apartment, where Ms. Fisher retrieved her own and her childrens' clothing. (R.39-40) Large appliances and bulky furniture were left behind. (R.42) Between July 1 and July 26, Ms. Fisher slept at her mother's home every night except 2-3 times. (R.46) Thus, Ms. Fisher had adopted a new residence in the area.

Ms. Fisher testified that she moved in with her mother on July 1, 1985. (R.68) She did not tell the police officers on July 26, 1985 that she lived at the defendant's apartment. (R.70) She obtained the key to the defendant's home on July 26, 1985 without his permission or knowledge. (R.71-72) She left some large items of furniture behind, only because the defendant had a need for them while she did not. (R.82, 95) Ms. Fisher was not on the lease to California apartment. She did not

contribute to the rent either before or after July 1, 1985. (R.101) Perhaps the most telling evidence is that after July 1, 1985, Ms. Fisher never went to the defendant's apartment by herself or with friends when he was not present. (R.102)

Based on these facts, the Illinois Appellate Court's conclusion that Ms. Fisher did not have the common authority over the Respondent's apartment that was necessary to validate her consent is a correct interpretation of the Matlock joint access test.

## CONCLUSION

The Illinois Appellate Court, and the Circuit Court of Cook County correctly applied the law regarding third party consent to warrantless entries and this cause presents no constitutional question of sufficient import to merit review by this court.

The Petition for Certiorari advanced in this case should be denied.

Respectfully submitted,

JAMES W. REILLEY*
2720 River Road
Suite 134
DesPlaines, Illinois
60018

Attorney for Respondent

CHRISTINE P. CURRAN
2720 River Road
Suite 134
DesPlaines, Illinois
60018
Of Counsel.

*Counsel of Record

(3)



No. 88-2018

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1989

---

THE STATE OF ILLINOIS,
Petitioner,

v.

EDWARD RODRIGUEZ,
Respondent.

---

On Writ of Certiorari to the
Appellate Court of the State of Illinois
First Judicial District

---

# BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

---

JOHN K. VAN DE KAMP
Attorney General
of the State of California
RICHARD B. IGLEHART
Chief Assistant Attorney General
JOHN H. SUGIYAMA
Senior Assistant Attorney General
RONALD S. MATTHIAS
Deputy Attorney General
CLIFFORD K. THOMPSON, JR.
Deputy Attorney General
350 McAllister Street, Room 6000
San Francisco, CA 94102
Telephone: (415) 557-0204
Attorneys for Amicus Curiae

23 pp

## QUESTION PRESENTED

Does a police officer's reasonable reliance upon a third party's apparent authority to consent to an entry or a search constitute "unreasonable" conduct within the meaning of the Fourth Amendment, thereby invoking the exclusionary rule?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES





## TABLE OF AUTHORITIES: (Continued)

**TABLE OF AUTHORITIES: (Continued)** **Page**



**Constitutional Provisions**



**Other Authorities**





No. 88-2018

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1989

---

THE STATE OF ILLINOIS,
Petitioner,

v.

EDWARD RODRIGUEZ,
Respondent.

---

**BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE**

---

On Writ of Certiorari to the
Appellate Court of the State of Illinois
First Judicial District

---

## INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

"While the so-called apparent authority doctrine has been increasingly relied upon by the lower courts in recent years in upholding third party consent searches, the doctrine has been most regularly employed in the state of California, where it originated in the 1955 decision in *People* v. *Gorg* [291 R.2d 469, 473 (1955) (Traynor, J.)]."

3 LaFave, *Search and Seizure*, pp. 262-263 (2d ed. 1987); see, e.g., *People* v. *Hill*, 72 Cal.Rptr. 641, 644 (1968), *aff'd*, *Hill* v. *California*, 401 U.S. 797 (1971); *People* v. *Robinson*, 116 Cal.Rptr. 455, 460-461 (1974).

The Illinois state courts have rejected the apparent authority to consent concept, however, based on their misreading of this Court's decisions in *Stoner* v. *California*, 376 U.S. 483 (1964) and *United States* v. *Matlock*, 415 U.S. 164 (1974). See, e.g., *People* v. *Bochniak*, 417 N.E.2d 722, 724 (Ill.App. 1981).

Our interest in vindicating a doctrine which recognizes that mistakes made by policemen acting reasonably cannot be deterred by the exclusionary rule and may not fairly be characterized as "unreasonable" conduct under the Fourth Amendment, brings the State of California before this Honorable Court as amicus curiae in support of petitioner.



## SUMMARY OF ARGUMENT

This Court has held that law enforcement officers may rely upon the consent of a third party who has actual authority to permit a warrantless search of another's premises. *United States* v. *Matlock*, 415 U.S. 164 (1974). Illinois state courts have rejected the majority view that policemen also may reasonably rely upon the apparent authority of a third party to give such consent. In this case, the difference between the third party's actual authority and apparent authority to consent lies in a police officer's reasonable mistake of fact. *Hill* v. *California*, 401 U.S. 797 (1971) and *Maryland* v. *Garrison*, 480 U.S. 79 (1987), both overlooked below, teach that a policeman's reasonable mistake of fact is not "unreasonable" conduct within the meaning of the Fourth Amendment.

The validity of the apparent authority doctrine does not turn on the often elusive distinction between mistakes of fact and mistakes of law, however, but on the reasonableness of the officer's reliance on the consent. Because policemen are not required to be experts on landlord-tenant law, for example, Fourth Amendment goals are no more jeopardized by forgiving an officer's reasonable mistake of property law than by forgiving his reasonable mistake of fact.

Although this Court repeatedly has identified as separate questions the contours of Fourth Amendment privacy and the scope of the exclusionary rule, the court below failed to consider the reasonableness of the officers' actions as relevant to the remedy of suppression. The deterrent effect of the exclusionary rule is weakest where the official conduct sanctioned results from a reasonable misapprehension of pertinent facts. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) broadly recognized this inherent limitation of the suppression doctrine. *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) restricted the

application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served." The court below was not mindful of these limitations. Because it failed to consider both the substantive and remedial implications of the reasonableness of the police officers' good faith mistake, the judgment of the Appellate Court of the State of Illinois must be reversed.

## ARGUMENT

### A POLICEMAN'S REASONABLE MISTAKE AS TO A THIRD PARTY'S ACTUAL AUTHORITY TO CONSENT IS NOT, WITHIN THE MEANING OF THE FOURTH AMENDMENT, "UNREASONABLE" CONDUCT INVOKING THE EXCLUSIONARY RULE

"The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983), quoted in *United States* v. *Leon*, 468 U.S. 897, 906 (1984).

The Illinois court incorrectly resolved both questions. First, in holding that official reliance upon a third party's consent given without actual authority automatically violates the Fourth Amendment, the court below focused exclusively on the existence of a constitutional right of privacy, without considering whether the police intrusion into protected privacy was "unreasonable" within the meaning of the Fourth Amendment. This approach forgets that "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable," *Skinner* v. *Railway Labor Exec. Ass'n*, 103 L.Ed.2d 639, 661 (1989), and



ignores the teaching of *Maryland* v. *Garrison*, 480 U.S. 79, 88 (1987) and *Hill* v. *California*, 401 U.S. at 804, that an officer's mistake of fact, if reasonable in the tort law sense, may be reasonable in the constitutional sense. Second, the state court suppressed evidence without considering the propriety of imposing the exclusionary rule, thereby ignoring the teaching of *United States* v. *Calandra*, 414 U.S. 338, 348 (1974), that "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

## A. A Police Officer's Reasonable Mistake of Fact Is Not "Unreasonable" Conduct Under he Fourth Amendment

In this case, the officer's belief that the consenting party had actual authority to permit a police entry constituted a reasonable mistake of fact. Gail Fisher told Officer Entress that Edward Rodriguez had beaten her earlier that day at the South California Street apartment where they had been living, where she kept her clothes and furniture, and to which she possessed a key. Fisher told Officer Entress that Rodriguez was sleeping in the apartment and admitted the police with her key in order to facilitate his arrest. Officer Entress had gained the impression that Fisher was presently residing at the South California address. While arresting Rodriguez, police officers seized narcotics which they observed in plain view.

After a hearing, the trial court suppressed this evidence, concluding that Fisher lacked actual authority to consent to the police entry because: (1) her name was not on the lease and she did not pay rent; (2) the apartment was not her usual place of residence; (3) Fisher enjoyed access to the apartment only when Rodriguez was present; (4) she did not bring guests to the apartment; (5) Fisher had removed her children and her clothing to her mother's residence, where she contacted the police.

Officer Entress believed that Gail Fisher resided at the South California address. Had Fisher in fact been a resident there, his assumption that she possessed legal authority to admit him would have been correct. In short, the officer's mistake was one of fact, not law.



Although mistaken, the officer's belief was reasonable because it was based on a presumptively reliable citizen-informant's statements that she had been living in the apartment, that she had been there earlier that day, and that her clothing and furniture remained there. These representations, together with Fisher's present possession of a key to the apartment, would lead a reasonably well trained police officer to believe that Fisher had actual authority to admit others into the flat.

The state trial court erred in failing to inquire into the reasonableness of Officer Entress' belief.[1] The state appellate court ratified this error on the authority of *United States* v. *Matlock*, which expressly reserved the question of apparent authority. 415 U.S. at 177 n.14. Instead, the Illinois courts should have been guided by this Court's decisions in *Hill* v. *California*, *supra*, and *Maryland* v. *Garrison*, *supra*.

*Hill* v. *California* excused a police officer's reasonable mistake of fact. Having probable cause to believe Hill had committed armed robbery, the police went to his apartment without a warrant. Miller, "who fit the description of Hill received from various sources," answered the door. 401 U.S. 799, 803. The officers, discrediting Miller's personal identification, his explanation for his presence in Hill's apartment, and his professed

---

1. The state courts' rejection of the apparent authority doctrine having foreclosed this inquiry, factual findings favorable to the State must be assumed for purposes of determining whether the case should be remanded to the trial court for further evidentiary hearing.

ignorance of a pistol and ammunition clip in plain view, arrested Miller believing he was Hill.

> "They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." 401 U.S. at 804.

Consequently, although Miller was later released, evidence discovered during a search of Hill's apartment incident to Miller's arrest was held admissible against Hill.

*Hill* did not reach this conclusion by reasoning either that the police had "probable cause" to arrest Miller, or that exclusion of evidence cannot deter reasonable mistakes of fact. Accordingly, *Hill* holds that a policeman's reasonable mistake of fact in identifying a person lawfully subject to arrest is not an "unreasonable" seizure within the meaning of the Fourth Amendment.

Following the *Hill* rationale, *Maryland* v. *Garrison* held that a police officer's reasonable mistake of fact in identifying the premises to be searched under a warrant is not conduct "unreasonable" under the Fourth Amendment. 480 U.S. at 88.

*Garrison* indicates that Fourth Amendment reasonableness may depend as much upon what the police



should find out as upon what they know.[2] The Illinois courts' criteria for determining actual authority offers a useful standard for assessing the adequacy of Officer Entress' investigation. Since actual authority "is, of course, not to be implied from the mere property interest a third party has in the property," *United States* v. *Matlock*, 415 U.S. at 171 n. 7, the officer's failure to demand Ms. Fisher's lease or rent receipts is not constitutionally fatal. Were the law otherwise, policemen might be asked to while away their duty hours in the county recorder's office or to file quiet title actions. Contra, *People* v. *Superior Court*, 83 Cal.Rptr. 732, 735 (Cal.App. 1976).

Officer Entress reasonably inferred from the circumstances that the South California address was Fisher's usual residence. That he interviewed Fisher in her mother's home did not undermine that inference given Rodriguez's beating of Fisher earlier that day.

Fisher's possession of a key was compelling evidence of unlimited access to the apartment. No competent officer would expect Fisher to have a key if she could enter only when Rodriguez was present, for he could admit her as easily as the key.

Nor was Officer Entress required to question Fisher about whether she invited guests to the apartment, for an affirmative response would add little to what Entress had learned, and a negative response would have been

---

2. "The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and disclose, to the issuing magistrate." 480 U.S. at 85.

consistent with Fisher's refusal to tell the officer whether Rodriguez was involved with narcotics.

Finally, discovering that Fisher had removed her two children from the apartment would have suggested to any reasonably competent officer only that she did not want them beaten, too.

Actual authority to consent to a police entry "rests on mutual use of the property . . . ." *United States* v. *Matlock*, 415 U.S. at 171 n. 7. Officer Entress reasonably concluded that Gail Fisher enjoyed joint access and mutual use of the South California premises. Therefore, the officer was not constitutionally derelict in failing to undertake a time-consuming investigation that offered little prospect of yielding convincing contrary evidence.

### B. A Police Officer's Reasonable Mistake of Law Is Not "Unreasonable" Conduct Under the Fourth Amendment

Illinois' rejection of the apparent authority doctrine has less to do with *United States* v. *Matlock* than with *Stoner* v. *California*, *supra*. See, e.g., *People* v. *Bochniak*, 417 N.E.2d at 724. In *Stoner*, state officers searched the defendant's hotel room without a warrant after being admitted by the hotel night clerk in Stoner's absence. The California Court of Appeal upheld the search as incident to Stoner's arrest in Nevada two days later. 376 U.S. at 859. In this Court, the California Attorney General acknowledged that the holding below was aberrant as a matter of state law, but argued that the search was justified by the consent of the hotel night clerk. *Id.* at 860. This Court disagreed, finding no



reasonable basis for the officers' belief that the clerk had authority to consent to search. *Ibid.*

The officers' mistake in *Stoner* was of law, not fact; the police knew that the consenting party was the hotel clerk, but did not know the scope of his legal authority to admit strangers into guests' rooms. *Stoner* is easily distinguished, as by some, based on the difference between an officer's mistake of fact and his mistake of law. E.g., 3 LaFave, *supra*, at 262 n.96. Such a distinction, however, overlooks the central point of *Stoner* and requires absurd results in the application of the apparent authority rule.

The actions of the police in *Stoner* were not constitutionally unreasonable because their mistake was one of law, rather than of fact; instead, their conduct was unreasonable in the tort law sense, i.e., it fell below the behavioral norm of a reasonably well trained officer. First, the officers' conduct violated state law.[3] "The *sine qua non* of the operation of the rule of *Gorg* is an honest belief based on reasonable grounds." *People* v. *Hill*, 72 Cal.Rptr. at 644 n. 5. Four years before the *Stoner* search the California Supreme Court had declared: "The entry of the officers cannot be justified on the ground that they reasonably believed in good faith that the [apartment] manager had authority to consent thereto." *People* v.

---

3. It is one thing to say that Fourth Amendment reasonableness does not depend on the law of the particular state in which the search occurs, *California* v. *Greenwood*, 100 L.Ed.2d 30, 39 (1988), and another thing to say that a well trained officer need not know the state law limits on his authority.

*Roberts*, 303 P.2d 721, 722 (1956). Second, the officers' actions in *Stoner* were contrary to then-existing decisions of this Court. As *Stoner* explained, "[a]t least twice this Court has explicitly refused to permit an otherwise unlawful police search of a hotel room to rest upon the consent of the hotel proprietor." 376 U.S. at 489 (citing *United States* v. *Jeffers*, 342 U.S. 48 (1951) and *Lustig* v. *United States*, 338 U.S. 74 (1949)).

*Stoner* does not foreclose application of the apparent authority doctrine to an officer's reasonable mistake of property law; *Stoner* simply rejects an officer's subjective good faith as an excuse for his *un*reasonable mistake of constitutional law. Cf. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987); *Illinois* v. *Krull*, 480 U.S. 340, 355 (1987); *United States* v. *Leon*, 468 U.S. 897, 923 (1984); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979); *Glasson* v. *City of Louisville*, 518 F.2d 899, 910 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

California's apparent authority to consent doctrine recognizes that "[p]olicemen are not required to be experts in the law of landlord and tenant." *People* v. *Robinson*, 116 Cal.Rptr. at 461. Fourth Amendment goals are not jeopardized by forgiving an officer's ignorance of a law he has no duty to know.

Further, the mistake of fact/mistake of law distinction is of limited use in the exclusionary rule context. The point of this dichotomy is to separate misapprehensions of fact which, if reasonable, are undeterrable, from misunderstandings of law which, if deterrable, must be held unreasonable. See *Michigan* v. *Tucker*, 417 U.S. 433, 447; *United States* v. *Whaley*, 781



F.2d 417, 421 (5th Cir. 1986). Unfortunately, "[w]hat is an error of fact and what is an error of law in a given matrix is not always capable of easy resolution." *People* v. *Washington*, 186 Cal.Rptr. 3, 5 (1982). Worse, this approach "begs the question . . . in that the seminal issue is that of *reasonableness*." *People* v. *Howard*, 208 Cal.Rptr. 353, 358 (1984).

### C. The Exclusionary Rule Does Not Deter A Policeman's Reasonable Mistakes

In *Michigan* v. *Tucker*, 417 U.S. at 447, this Court explained:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or their future counterparts, a greater degree of care toward the rights of an accused. Where official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The deterrent effect of the exclusionary rule is weakest where the illegality sanctioned results from a reasonable police misapprehension of relevant facts. A decision suppressing evidence may instruct the police as to the law they must follow henceforth, but such a decision cannot alter their perception of facts in future cases. As

recognized in *People* v. *Gurley*, 100 Cal.Rptr. 407, 419 (1972):

> "In the situation where the officers act reasonably on the evidence before them . . . the exclusion of evidence seized with [defendant's] apparent consent will not prevent similar conduct in the future under similar conditions. No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future." Cf. *Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986).

No deterrence results, either, from suppressing evidence resulting from a policeman's reasonable misapprehension of law he is under no duty to know. Accordingly, the exclusionary rule was misapplied below when the state court suppressed evidence without taking into account the reasonableness of the officer's good faith mistake. See *United States* v. *Calandra*, 414 U.S. at 348.



## CONCLUSION

The judgment of the Appellate Court of the State of Illinois should be reversed and the case should be remanded for further proceedings.

DATED: December 14, 1989

JOHN K. VAN DE KAMP
Attorney General
of the State of California

RICHARD B. IGLEHART
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General

RONALD S. MATTHIAS
Deputy Attorney General

CLIFFORD K. THOMPSON, JR.
Deputy Attorney General

Attorneys for Amicus Curiae

**CERTIFICATE OF SERVICE BY MAIL**

No. 88-2018

---

THE STATE OF ILLINOIS,
Petitioner,

v.

EDWARD RODRIGUEZ,
Respondent.

---

CLIFFORD K. THOMPSON, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Room 6000, in the City and County of San Francisco, State of California; that on December 14, 1989, he served true copies of the attached Brief for the People of the State of California as Amicus Curiae in the above-entitled matter on counsel for petitioner by placing same in envelopes addressed as follows:

Terence M. Madsen
Office of the Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Renee Goldfarb
Office of State Attorney
309 Richard J. Daley Center
Chicago, Illinois 60602

Christine P. Curran
James W. Reilly and Associates
2720 River Road, Suite 134
Desplaines, Illinois 60018

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

CLIFFORD K. THOMPSON, JR.
Deputy Attorney General

No. 88-2018

In The

# Supreme Court of the United States

October Term, 1989

STATE OF ILLINOIS,

*Petitioner,*

vs.

EDWARD RODRIGUEZ,

*Respondent.*

**On Writ Of Certiorari To The Appellate Court Of Illinois First Judicial District, Third Division**

## JOINT APPENDIX

NEIL F. HARTIGAN
Attorney General
State of Illinois
ROBERT J. RUIZ
Solicitor General
TERENCE M. MADSEN*
WILLIAM P. PISTORIUS
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2235
CECIL A. PARTEE
Cook County State's Attorney
309 Richard J. Daley Center
Chicago, Illinois 60602
RENEE GOLDFARB
PAUL GLIATTA
Assistant State's Attorneys
Of Counsel
*Counsel for Petitioner*

JAMES W. REILLEY*
2720 River Road,
Suite 134
Des Plaines, Illinois 60018
(708) 299-8870
*Counsel for Respondent*

*Counsel of Record

**PETITION FOR WRIT OF CERTIORARI FILED JUNE 5, 1989**
**CERTIORARI GRANTED OCTOBER 30, 1989**

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

108 pp

# TABLE OF CONTENTS

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 27, 1985 – Complaints filed in the Circuit Court of Cook County charging Edward Rodriguez with the battery of Gail Fisher and with possession of a controlled substance.

September 11, 1985 – Preliminary hearing held.

September 27, 1985 – Information filed in the Circuit Court of Cook County charging Edward Rodriguez with possession of a controlled substance with intent to deliver and possession of cannabis.

January 22, 1986 – Motion to Quash Arrest and Suppress Evidence filed by Edward Rodriguez.

August 18, 1986 – Hearing held on Motion to Quash and Suppress.

September 5, 1986 – Hearing continued on Motion to Quash and Suppress.

September 17, 1986 – Argument of counsel heard on the Motion to Quash and Suppress. Motion granted.

October 17, 1986 – Notice of Appeal filed by the People of the State of Illinois.

January 11, 1989 – Unpublished order of the Appellate Court of Illinois, First District, Third Division, affirming the trial court filed.

April 5, 1989 – Order of the Illinois Supreme Court denying the State's Petition for Leave to Appeal.

---

STATE OF ILLINOIS )
) SS:
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

EDWARD RODRIGUEZ,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Indictment No. 85 C 10942

Before: JUDGE JAMES M. SCHREIER

Monday, August 18, 1986.

Court having reconvened pursuant to adjournment.

APPEARANCES:

MR. JAMES REILLEY and
MS. CHRISTINE CURRANS,
appeared on behalf of the Petitioner-Defendant;

HON. RICHARD M. DALEY,
State's Attorney of Cook County, by
MR. JAMES BIGONESS,
Assistant State's Attorney,
appeared on behalf of the People;

* * *

(p. 2) JAMES ENTRESS,

called as a witness on behalf of the Petitioner-Defendant



herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REILLEY:

(p. 3) Q. Officer, will you please state your full first and last name and spell your last name for the court reporter?

A. James Entress. E-n-t-r-e-s-s. Star 8114, work out of the 9th District.

Q. Officer, as of July of 1985, how long have you been a Chicago Police officer?

A. July of '85?

Q. Yes?

A. Twelve and a half years.

Q. Now, calling your attention specifically, Officer Entress, to July 26, 1985, were you on duty on that date, sir?

A. Yes, sir, I was.

Q. Did you have occasion to go to the area of 3554 South Wolcott in Chicago, Cook County, Illinois on that date?

A. Yes, sir?

Q. Will you tell his Honor, Judge Schreier, what time you arrived at the location and why is it that you went there?

A. We arrived there approximately 2:30 in the afternoon. A uniformed car had called for an assistance of a tact team.

Q. When you say "we" officer, can you tell us who was (p. 4) with you?

A. My partner Ricky Gutierrez.

Q. Spell the last name.

A. G-u-t-i-e-r-r-e-z. Star 7699.

Q. Plain closes [sic] or uniform on that date?

A. Plain clothes.

Q. You responded to a call from another officer, is that correct?

A. That's correct.

Q. What was the other officers name?

A. Officer Tenza. T-e-n-z-a. I believe.

Q. All right. Did you specifically speak to officer Tenza on a police radio before going there?

A. Yes, we did.

Q. Now when you arrived at 3554 South Wolcott with Officer Gutierrez was Officer Tenza already there?

A. Yes, he was.

Q. Did you go into a residence at that location?

A. Yes.

Q. And did you have a conversation with a Gail Fisher.



A. Yes, sir.

Q. How long, if you know, was officer Tenza there prior to your arrival?

(p. 5) A. I don't know.

Q. Okay. Did you speak with Gail Fisher at that point, yourself?

A. Yes, I did.

Q. Will you tell the court please what you said to Gail Fisher and what she said to you.

MR. BIGONESS: Objection your Honor. Foundation.

THE COURT: Who else was present?

MR. BIGONESS: And time, if counsel can.

MR. REILLEY: Let me with draw that.

At the time you spoke with Gail Fisher and she spoke to you, officer, can you tell us what time it was?

A. It was around 2:30 In the afternoon.

Q. On July 26, 1985?

A. Yes that's correct.

Q. Who else was presence [sic] during the conversation?

A. My partner, Officer Gutierrez, Officer Tenza, Gail Fisher, and and and Dorothy Jackson.

Q. Do you know if Dorothy Jackson is Gail Fisher's mother?

A. I believe stepmother.

Q. Stepmother? Okay.

A. I believe so.

Q. Other than those you have named, was anyone else (p. 6) present?

A. No, sir.

Q. Okay. Tell the court what you said to Gail Fisher and what she said to you or in your presence?

A. She stated to me that she – and I could see she had been the victim after battery. She stated –

Q. Tell us what she said?

A. She stated Edward Rodriguez earlier in the day had beaten her at their apartment at 3519 South California. She stated that she wanted to sign complaints. That all her clothes and her furniture were in that apartment and that she had her own key for the apartment. That she would open the door and allow us to go into arrest Eddie Rodriguez who was at the apartment at the time and she felt he was sleeping.

Q. Okay. Okay. Officer, when Gail Fisher told you that Eddie Rodriguez had been had beaten her earlier in the day can you be more specific if you recall what time she said that occurred?

A. The only thing I can remember on that, sir, is that she had said earlier in the day.

Q. Okay. Have you had a chance to refresh you memory as to the time by reading any police reports that were prepared with regard to that incident?



(p. 7) A. The only place that would show what time it was would be on the original made by officer Tenza and I really haven't reviewed that.

MR. REILLEY: Okay. May I approach the witness, Judge?

THE COURT: Yes.

MR. REILLEY: Q. Officer I'm going to show you a group of police reports which were tendered to me in discovery. And one of them appears to be authored by Officer Tenza. Let me ask you if this report I'm showing you now is the report your referring to?

MR. BIGONESS: Objection your Honor. I'm not sure what counsel is trying to do. I think he's trying to refresh this officers recollection with another officers report.

MR. REILLEY: That's right.

THE COURT: You can refresh recollection by another officers report or you can refresh recollection by someone doing a hand stand in court. Doesn't have to be his own report to refresh recollection.

MR. REILLEY: Q. Officer will you take a look at that report please?

A. Okay.

Q. First of all, the report that you're looking at, can you tell the court if you have ever seen that report (p. 8) before?

A. I seen it on that date, yes, sir.

Q. What report does that – purport to be?

A. This is an aggravated battery with the victim being Gail Fisher and the offender Edward Rodriguez from that date.

Q. Is this the report prepared by officer Tenza, to your knowledge, regarding the incident your testifying about?

A. To my know knowledge, yes, sir.

Q. In looking over the various boxes on the report. Is there any indication there as to the time that the alleged battery occurred?

MR. BIGONESS: Objection your Honor.

THE COURT: Overruled.

THE WITNESS: He has an occurrence of 26 July, '85 at 1100 hours which is 11:00 O'clock in the morning. But I don't ever remember being told that was the time.

THE COURT: So it doesn't refresh your collection?

THE WITNESS: No, it doesn't.

MR. REILLEY:

Q. You only recall that the victim Miss Fisher told you it was earlier in the day, July 26, 1985?

A. Yes, sir.

(p. 9) Q. Do you know when she called the police or if she – strike that.

Do you know if she called the police?

A. I really don't know who called the police.



Q. Do you know when the police were called?

A. No, sir.

Q. When you received the radio communication from Officer Tenza, approximately what time of the day was it?

A. It was around 2:30 in the afternoon.

Q. Okay. And you went then to the Wolcott address and arrived there how soon after the phone call or the radio communication?

A. We were there within five minutes when he called for us.

Q. Did you ask Gail Fisher on that date, as you were speaking to her, where she was living?

MR. BIGONESS: Objection. At what point.

MR. REILLEY:

Q. The time you were speaking to her in my earlier question you were speaking with Gail Fisher at the residence at 3554 South Wolcott with your partner, Officer Gutierrez present, Gail Fisher present, yourself present officer Tenza present and Miss Jackson present. Do you recall that conversation?

(p. 10) A. I recall the conversation, yes, sir.

Q. During that conversation, did you ask Gail Fisher where she was residing?

A. I had asked her – she stated where this occurrence – where this had occurred at 3519 South California. She further related to me stated to me that she – all her

property was there and that she had been living there. I didn't go into specifics with her as if she had just moved out or anything like that. But she stated to me she had been living there and that she has the key, her own key and that all her property was at that apartment.

Q. Officer, do you remember testifying at a preliminary hearing regarding people of State of Illinois versus Edward Rodriguez before the Honorable Judge John Morrissey on September 11 1985?

A. Yes, sir.

Q. Do you recall being asked certain questions by the state's attorney and myself and giving certain answers?

A. I remember to the best of my knowledge. The little what I can remember.

MR. REILLEY: Page sixteen, Counsel.

Do you remember me asking you this question during that hearing, page sixteen, line twelve.

(p. 11) "Q. Did Gail Fisher tell you she lived at 3510 South California?

A. She stated she used to live there.

MR. BIGONESS: Objection impeaching, Your Honor. That's exactly what he said. She had been living there.

MR. REILLEY: That's not what he said.

THE COURT: Overruled.

MR. REILLEY:



Q. Do you remember giving that answer to that question, Officer?

A. Yes, sir.

Q. Now, was that the answer that you gave that day that she stated she used to live there?

A. To the best of my recollect, yes.

Q. Let me ask you this, officer.

On July 26, 1985, was it your impression that Gail Fisher no longer lived at 3510 South California?

A. No.

Q. It was not?

A. No.

Q. It was your impression she did or didn't live there?

(p. 12) A. It was my impression she lived there but she wasn't there that day that she had – she was there that day earlier and that's where the offense had occurred. So, my feeling was that she was still living there or she wouldn't have been there when the offense had occurred.

Q. Even though she told you she used to live there, is that right?

A. She stated she had been living there.

Q. Well, your answer was she used to live there, didn't did she say she used to live there or she had been living there. What did she say?

A. To the best of my recollection, she stated that she had been living there.

Q. Now that's your recollection today on August 18, 1986, is that correct?

A. That's correct.

Q. Was your recollection better on September 11, 1985 of this incident or worse?

A. It could conceivably be better.

Q. Did you have a conversation with the lady who you have identified as Miss Jackson at the same time and place?

A. Yes, sir.

Q. Did Miss Jackson who you have described as her stepmother, tell you that Gail Fisher had been living (p. 13) there for at least three or four weeks prior to July 26, 1985?

A. No, sir she never told me that.

Q. She never told you that? Okay. How long were you at 3554 South Wolcott before you left and went to another location?

A. Approximately five, ten minutes.

Q. Okay. Did you eventually go over to an address of 3519 South California?

A. Yes, sir?



Q. Prior to going to that address, did you have in your possession either a search warrant or an arrest warrant to either arrest or search the person and apartment at 3519 South California?

A. No, sir.

Q. Did you have a complaint signed by any victim of any alleged battery prior to going to 3519 South California?

A. No, sir.

Q. You went over to that address and you were there with officer Gutierrez and Officer Tenza, is that correct, sir?

A. We also had Miss Fisher and Miss Jackson with us.

Q. Okay. So there were five of you?

(p. 14) A. That's correct.

Q. How did you get into the apartment at 3519 South California?

A. Gail Fisher walked up to the door opened the door with a key, opened the door and allowed us entrance into the apartment.

Q. Let me go back to the conversation that you were having at 3554 south Wolcott with Gail Fisher and the others who you previously stated were present.

Other than what you have already stated was said at that time, was there anything else said by Gail Fisher concerning the incident that occurred earlier that day?

A. Concerning the battery?

Q. Yes, sir.

A. Not that I can recall.

Q. All right. Did you –

A. Oh, yes, there was.

Q. There was? Please tell us what it was?

A. She had stated he had kept her in the apartment. I do not remember how how long, but he refused to allow her to leave the apartment.

Q. Your [sic] referring to July 26, 85?

A. Yes, sir.

(p. 15) Q. Okay. Did you testify earlier that she said that she thought Mr. Rodriguez was at home sleeping?

A. Yes, sir.

Q. Okay. You did say that. All right.

When you went to the location, did you check with the landlord to find out whose apartment it was?

A. No, sir. I did not.

Q. Did you ever determine prior to entering the apartment that the apartment was in the name of Edward Rodriguez?

A. No, sir.

Q. What was your purpose, officer, in going to the 3519 South California address on July 26, 1985?



A. To arrest Edward Rodriguez for an aggravated battery.

Q. That's the same aggravated battery that you had no complaint signed, is that correct?

A. At that time, yes, sir.

Q. All right. Now, this was 2:30 In the afternoon, is that correct?

A. Approximately.

Q. What day of the we can [sic] was it?

A. I cannot recall.

Q. Was it during the week or was it on the weekend?

(p. 16) A. I can not recall.

Q. If I can refresh your memory as to that, that it was on a Friday, July 26, 1985, would that refresh your recollection?

A. If you say so.

Q. Now, July 26th is not a court holiday, is it?

A. Not to my knowledge.

Q. Being an officer for twelve and a half years, you're aware that there's a lot of judges in this building and in various other buildings throughout the Cook County area, is that correct?

A. Yes, sir.

Q. All right. Did you attempt, officer, to go have a complaint signed for aggravated battery or battery or

obtain an arrest warrant from any judge in the circuit court of Cook County prior to going over there?

A. No, sir.

Q. So, it's your testimony that Gail Fisher opened the door with a key she happened to have, is that correct?

A. She stated it was her key.

Q. Now, answer my question.

Did she open the door with a key that she happened to have? Did she put the key in the lock?

A. Yes, sir.

(p. 17) Q. And turn it?

A. Yes.

Q. The door was locked when you got there, isn't that true?

A. Yes.

Q. Okay. So you didn't have to kick the door down or anything? She opened it up with the key?

A. That's correct.

Q. Okay. Now, when the door was opened, what did you do?

A. We entered the apartment.

Q. Did you knock before you had Gail Fisher open the door with the key she had?

A. No, sir.



Q. Did you ring the door bell, if there was one?

A. No, sir.

Q. When the door was opened, who entered first, if you recall?

A. I did.

Q. Before entering, did you call out the name Ed Rodriguez?

A. No, sir.

Q. did you call out anything?

A. No, sir.

(p. 18) Q. When you went inside, what room did you enter into?

A. The first room is technically, I guess it's a living room but they had a bed in the middle of it.

Q. That's the room you entered as you walk in the door?

A. Yes, sir.

Q. You were already over the threshold and into the apartment, is that correct?

A. That's correct.

Q. Did you see any persons in there?

A. No, sir.

Q. Did you call out anything?

A. No, sir.

Q. Were the other officers namely Gutierrez and Tenza right behind you?

A. No, sir. Officer Tenza was securing the rear exits. He wasn't – he didn't go in when my partner and I went in.

Q. You and Officer Gutierrez went?

A. That's correct.

Q. How about Gail Fisher and Miss Jackson?

A. No. When she opened the door, she returned to the police vehicle.

(p. 19) Q. Now, you went into the living room area and your partner Gutierrez did. Did you say anything at that point did you call out any names?

A. No, sir.

Q. Where's the next place you went?

A. Right into a bedroom which is to the left of that room.

Q. Did you see Mr. Rodriguez in the bedroom?

A. Yes, sir.

Q. He was sleeping?

A. Yes, sir.

Q. How long were you in the apartment before you woke him up?

A. Probably anywhere from a half a minute to a minute and a half.



Q. Half a minute to a minute and half? When you walked in the bedroom, did you have to wake him up by yelling or shaking him, calling out his name?

A. Yes, sir.

Q. In otherwords, he didn't hear you, apparently, that correct?

A. No, he did not.

Q. Isn't it a fact, officer that prior to waking him up, during that half a minute to minute and a half, that (p. 20) you and or your partner, had already looked through various items in various rooms and had seized what the state would seek to introduce into evidence against him in this proceeding, is that true?

A. We had – what do you mean by look through? You mean like physically handling?

Q. Physically handling, opening things up, retrieving things with your hands. Did you do any of that?

A. No, sir.

Q. Did you pick up any items which the state seeks to introduce into evidence, before you work [sic] up Mr. Rodriguez?

A. No, sir.

Q. Did you look in any brief cases in the bedroom?

A. Yes, sir we looked into two open brief cases.

Q. Okay. Was that before or after you work [sic] up Mr. Rodriguez?

A. That was during the course of waking him up.

Q. You were looking in the brief case?

A. Yes. They were right at the foot of bed.

Q. Again you didn't have a search warrant to search that room or the contents of the room, did you?

A. No, sir.

Q. You found various items throughout the house that (p. 21) the state seeks to introduce into evidence namely control substance and or cannabis sativa, is that correct?

A. Yes.

Q. Find some in the bedroom?

A. Yes, sir.

Q. Without getting specific where they were, you found some in the living room?

A. Yes, sir.

MR. REILLEY: May I just have a moment, Judge?

THE COURT: Yes.

MR. REILLEY:

Q. Officer, as you entered the apartment, that is you and officer Gutierrez, you were in that living room where you have described a bed, you walked through that area prior to going into the bedroom, is that correct, sir?

A. That's correct.



Q. And is it a fact, that you saw some items perhaps some Tupperware, in the living room which you looked into prior to going into the bedroom, is that true?

A. That's correct.

Q. You didn't expect to find Mr. Rodriguez in the Tupperware, did you?

A. No, sir.

THE COURT: Did you say you looked through the (p. 22) Tupperware.

THE WITNESS: The Tupperware was in plain and open view. It wasn't covered. We have – we had to walk past it to get into the bedroom.

THE COURT: All right.

MR. REILLEY:

Q. The point is, you did look into that – what you have described as being in plain and open view prior to going in to arrest Mr. Rodriguez, is that right?

A. Yes, sir, I did.

Q. And you went into the bedroom and then you look into these two attache cases, is that correct?

A. That's correct.

Q. That's again, before you woke up the defendant?

A. That's during the course of waking him up. We observed it – two attache cases at the side of the bed and as were reaching over waking him up, we can – we could look right into the attache case.

Q. They open also just like the Tupperware?

A. Yes, sir.

Q. Going back to your conversation with Miss Fisher, at the other address on Wolcott, you have related to the best of your recollection, everything she said to you and you said to her about this incident, is that correct?

(p. 23) A. During the conversation about the – about arresting Ed Rodriguez, I had stated to her that we would only go in and lock him up if she was sure that she wanted to press charges on him. She was a little hesitant it seemed to me about signing complaints. So then, I had recalled a year earlier a conversation with someone concerning an Edward Rodriguez that –

Q. Who was the someone you had the conversation with a year earlier?

A. I cannot remember.

Q. Then I'm going to ask you this question and please answer my question –

MR. BIGONESS: I'll ask the witness be allowed to answer.

MR. REILLEY: I'm entitled to have an answer to my question. This is direct examination. Not responsive.

THE COURT: Ask the other – another question Mr. Reilley. If you want to have him finish any answer, you can on your examination.

MR. REILLEY:



Q. My question, officer, was relating the conversation that you had with Gail Fisher. You were stating that you felt she was reluctant or she said she wasn't sure she wanted to sign a complaint, is that part of (p. 24) the conversation?

A. She was little hesitant, yes, sir.

Q. All right. Besides what you determined to be her hesitancy, did she say anything else to you? That's my question, her words?

A. I'm getting to that. That's what – what the conversation – you wanted the conversation.

Q. Tell me what she said. Just what she said. That's my question.

A. How can I give you what she said until I tell you what I asked her.

Q. Tell me what you asked her?

A. Okay. I asked her if Edward Rodriguez dealt in narcotics.

Q. Okay. You asked her that?

A. Yes.

Q. What did she say?

A. She didn't answer. And I said well if you're afraid, of us going in to your apartment and locking him up, then you tell us now and we won't go in there. And at this point, she thought for a few seconds and then she said no. She's says, "I want to sign complaints I want to go to court. I will open the door for you."

Q. Okay. Then when you asked her about dealing in (p. 25) narcotics she didn't answer your question, is that correct?

A. That's correct.

Q. All right. And she said she wanted to sign a complaint?

A. Yes, she did.

Q. And to go to court, is that what she said?

A. Yes, she did.

Q. Did you take her over to the state's attorney's office, draw up a complaint, have her sign it in front of a judge before you went to the apartment?

A. No, sir.

Q. You weren't told by the way that Mr. Rodriguez was about to leave the country, were you?

A. No, sir.

Q. Okay. Did you take – Gail Fisher to the hospital before you went over to the apartment where you arrested the defendant? Yes or no?

A. No, sir.

THE COURT: Any further questions Mr. Reilley?

MR. REILLEY: Pardon me?

THE COURT: Any further questions.

MR. REILLEY: I believe I have nothing else at this time.



THE COURT: All right. Mr. BIGONESS.

(p. 26) CROSS EXAMINATION

BY MR. BIGONESS:

Q. Now, officer, you received a call from a beat car requesting assistance on July 26, 1985, at about 2:30 In the afternoon, correct?

A. That's correct.

Q. And the location of that call was 3554 South Wolcott, correct?

A. Yes, sir.

Q. You proceeded to that location where you met Officer Tenza, Gail Fisher and Gail Fisher's mother, Dorothy Jackson, correct?

A. Yes.

Q. And you had a conversation with Miss Fisher, at that time, correct?

A. That's correct.

Q. And Miss Fisher told you that she had been living at 3519 South California, with Edward Rodriguez, correct?

A. Yes, sir.

Q. She also told told you that her clothes and furniture were still in the apartment at the time she was speaking with you, correct?

A. That's correct.

Q. She – did she at any time refer to the apartment (p. 27) at 3519 South California as his apartment?

A. My recollection was she used their apartment and our apartment.

Q. So, at no time did she say his apartment. It was always in terms of our apartment or their apartment meaning –

A. That's correct.

Q. Okay. Now, you had a – had a short conversation with Miss Fisher at that location at 3554 South Wolcott at that time, correct?

A. Yes, sir.

Q. And after speaking with her, you and officer Gutierrez, officer Tenza, Miss Jackson and Miss Fisher all proceeded to 3519 South California, correct?

A. That's correct.

Q. Now, when you had that conversation with Miss Fisher, she told you that she had a key to their apartment, correct?

A. That's correct.

Q. Now, you testified that she initially showed some hesitancy to he [sic] sign a complaint against – well strike that.

You said that she showed some hesitancy. Hesitancy to sign a complaint or hesitancy to open the (p. 28) door?

A. She appeared to be afraid, intimidated by the offender. And I didn't know whether she was afraid to



open the door or whether she was afraid what would happen if she signed a complaint on him.

Q. All right. Now at any time did you or your brother officers or Miss Jackson for that matter ever pressure – exert any type of pressure on Miss Fisher to agree to sign a complaint or to open the door?

A. No, sir.

Q. And you testified that after you spoke with Miss Fisher, you were left with the impression that Miss Fisher lived there occasionally, were those your words or lived there –

A. She – from the conversation she lived there. I don't know whether she was living there, you know, every day, but she kept using the word "our" and "their" apartment. And she stated that this was her key.

Q. And after this conversation you went to 3519 South California where Miss Fisher opened the front door to the apartment at that location, correct?

A. Yes, sir.

Q. And you were present when she opened the front door, correct?

(p. 29) A. That's correct.

Q. And after she opened the front door she went – she left the area of the door, went back to the car and you entered the premises?

A. Yes, sir.

Q. And as you entered, you noticed something unusual in the living room, correct?

A. Yes, sir.

Q. Now, you referred in your direct testimony to some Tupperware. That Tupperware had lids on it when you saw it for the first time or not?

A. No, sir, it did not.

Q. And after you went through the living room – by the way, did you notice anything else besides the Tupperware?

A. There was drug paraphernalia like scales and pipes laying scattered on the bed. On the table next to the Tupperware was a large scale.

Q. Did you notice anything inside the Tupperware?

A. Yes, sir.

Q. What was that?

A. A white powder that I suspected to be cocaine.

Q. Had you ever seen cocaine before this date?

A. Yes.

(p. 30) Q. Approximately how many times?

A. Hundreds.

Q. And this had the same appearance as the cocaine you observed on other occasions, correct?

A. Yes, sir.

Q. And the cocaine – white powder on other occasions turned out to be cocaine, isn't that correct?

A. That's correct.



Q. After you left out of the living room, you then walked into which room?

A. Walked into the bedroom.

Q. What if anything unusual did you notice there?

A. At the foot of bed I observed two open attache cases.

Q. What did you see inside those attache cases?

A. Clear plastic bags containing the white substance.

Q. Was it similar in appearance to other white powder you saw in the living room and the other white powder you have seen hundreds of times in your duty as a police officer?

A. Yes, sir.

Q. What did you do after you noticed the attache cases open, if anything?

A. We woke up Edward Rodriguez, told him we were (p. 31) police officers, placed him under arrest advised him of his constitutional rights, and handcuffed him.

Q. Now, up to that point, had you even touched the Tupperware, the scales, paraphernalia or attache cases?

A. No, sir.

Q. After you placed this man under arrest, what happened, what did you do?

A. We brought him back out into the front room.

Q. Did he say anything to you, at that time.

MR. REILLEY: I'll object. Were getting beyond the scope of the motion.

MR. BIGONESS: There's some additional evidence recovered –.

THE COURT: Overruled.

MR. BIGONESS:

Q. What if anything did Mr. Rodriguez say?

A. He asked if he could get his money out of a dresser drawer which was in the front room.

Q. All right. And what, if any action did you take?

A. I took him over to the dresser drawer and opened the drawer that he stated the money was in.

Q. And what if anything did you see?

A. I found approximately four hundred fifty-two dollars, USC co-mingled with another clear packet (p. 32) containing white substance.

Q. What did you do with the defendant after you found the money and the drugs in the dresser?

A. Had him transported into the 9 District.

Q. After he was transported, did you have occasion to inspect the premises you have just described at 3519 South California?

A. Only the bedroom and the – and that front room. We didn't go any further.



Q. And was the material you have described the suspect cocaine, and the money and the paraphernalia all inventoried?

A. Yes, sir.

Q. By the way, officer, did Miss Fisher subsequently sign a criminal complaint against Edward Rodriguez.

MR. REILLEY: Objection. Relevance.

THE COURT: Overruled.

THE WITNESS: Yes, she did.

THE COURT: Complaint for aggravated battery?

THE WITNESS: No, sir. Simple battery.

THE COURT: Simple battery.

MR. BIGONESS:

Q. Why was not a complaint for aggravated battery submitted to Miss Fisher to sign?

(p. 33) A. A state's attorney from felony review would not approve the charge of aggravated battery.

THE COURT: Occurring that same date?

THE WITNESS: Yes, sir.

MR. BIGONESS:

Q. Now, officer, do you know what time – you, yourself, by the way of personal knowledge know what time the battery occurred to Gail Fisher?

A. All I know is it was earlier in that day.

Q. Could have been 2:25, as far as you know?

A. As far as I know.

Q. And as far as that goes, you described on direct testimony the appearance of Miss Fisher. Could you describe that a little further? What did you notice about her that was unusual?

A. Her jaw was swollen and she had a black eye she had bruises on her neck. She looked like she was the victim of a beating.

Q. In fact she had sustained a broken jaw hadn't she?

A. Yes, sir.

MR. REILLEY: Objection. This is after the fact knowledge, Judge.

THE COURT: Sustained as to what he knew at the time.

MR. BIGONESS: Okay. Nothing further your Honor.

(p. 34) REDIRECT EXAMINATION,

BY MR. REILLEY:

Q. Officer, do you know who it was that contacted the state's attorneys office after the arrest of Mr. Rodriguez to attempt to obtain approval for aggravated battery charges?

A. It was an investigator but I really do not remember his name.



Q. To refresh you, was it possibly investigator Scarpetto?

A. It could have been, yes, sir.

Q. Were you present when he did that?

A. Yes, sir.

Q. What time of the day was this?

A. I really can't remember.

Q. Let's say was it before 5 o'clock p.m.?

MR. BIGONESS: Your Honor I object to this line of questioning.

MR. REILLEY: He brought it out.

THE COURT: Well sustained. I think we have gone far enough.

MR. REILLEY:

Q. All right. My point is, officer, you didn't bother to call the state's attorneys office before you went (p. 35) to Rodriguez' apartment to get approval for aggravated battery or simple battery charges, is that correct?

A. No, sir.

Q. By the way, when you went into the apartment, and saw this Tupperware which you have previously described, did you immediately stop what you were doing[,] secure the apartment, and attempt to obtain a search warrant?

A. No, sir.

MR. REILLEY: Nothing else judge.

THE COURT: Thank you officer. You may step down.

(witness excused)

THE COURT: Who are the next witnesses?

MR. REILLEY: Judge, I – there are no others today that I can call. I understand counsel has a deputy sheriff here who is apparently the mother or stepmother of the victim. And –

MR. BIGONESS: Just one other witness your Honor.

THE COURT: Call her right now.

MR. BIGONESS: I'd call her as my witness.

THE COURT: All right.

MR. REILLEY: I have no objection to that, Judge.

THE COURT: All right.

DOROTHY JACKSON,

called as a witness on behalf of the People of the State of (p. 36) Illinois, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BIGONESS:

Q. Ma'am, would you please state your name and spell your last name?

A. Dorothy Jackson. J-a-c-k-s-o-n.



Q. And speak up a little louder when you answer.

A. Yes, sir.

Q. Are you employed, Miss Jackson?

A. Yes, I am.

Q. Where are you employed?

A. Cook County Deputy Sheriff.

Q. Now, do you know a woman by name of Gail Fisher?

A. That's my daughter.

Q. And Id like to – strike that.

Where do you live, Miss Jackson?

A. I live at 3554 south Wolcott in Chicago.

Q. And who do you live there with?

A. Myself.

Q. All right. Now directing your attention to about July 1, 1985, who were you living with on that date?

A. I was living by myself.

Q. Now, did you happen to see Gail Fisher on July 1, (p. 37) 1985?

A. Yes, I did.

Q. About what time did you see her?

A. Well, probably the first time I saw her, it was in the morning when I was babysitting. You know, she would drop the children off for me to babysit.

Q. She has children?

A. Yes.

Q. How many children does she have?

A. She had 2 girls.

Q. How old were they on that date?

A. Well they are 3 and 5 now. So they had to be about 2 and 4.

Q. Okay. And did you babysit for Miss Fisher?

A. Yes, I did.

Q. And were you baby sitting for her on July first 1985?

A. Yes, I was.

Q. And you're taking care the children the two children?

A. Yes.

Q. You said you saw Miss Fisher?

A. Yes.

Q. On July 1st, what time did you see her?

(p. 38) A. In the morning before she went to work because she only worked three blocks away.

Q. Okay. Approximately what time was it, if you recall?

A. Within an hour, I could say between 8:30 and 9:00. Between 8:00 and 9:00.



Q. And did you have a conversation with Miss Fisher, at that time?

A. Not usually. She just dropped the children off and she went.

Q. How about on this date did you have a conversation with her?

A. Well, after I put the children to bed I was, you know, in the house and someone was coming up the back door. And you know that really startled me because no one usually comes in the house, right.

Q. Who was that person that came to the back door?

A. That was my daughter, Gail Fisher.

Q. Was she carrying anything?

A. She had – I don't know. She had something in her hands. Probably her purse. And – the – what really scared me is –.

MR. REILLEY: Objection, your Honor.

THE COURT: Sustained. Ask another question.

(p. 39) MR. BIGONESS:

Q. Did you have a conversation with Miss Fisher at that time?

A. Yes, I did.

Q. Okay. What if anything did she tell you?

A. Well, I asked her what she was doing home from work so early but then, she had her shorts on so I knew she couldn't have been at work.

MR. REILLEY: I'll object to the –

THE COURT: What did she say. Just what did she say.

THE WITNESS: What did she say?

MR. BIGONESS:

Q. Did she say anything else to you, at that time?

A. She says, "we have to talk." She says, "Mom, we have got to talk."

Q. Okay. This is on July 1st?

A. Oh, no July first I'm sorry. No. July 1st when she came back after work, she wanted me to move her out move her clothes out. She said that Ed was going to go to band practice. Was on a Monday night. And so, she had the key to the house. So, I stayed in the car with the children and she took like –

Q. She had the key to what house?

A. To her apartment where her clothes were.

(p. 40) Q. Where was her apartment on July [1]st, 1985?

A. Where was her apartment?

Q. Yes.

A. 35th and California. 3519 South California.

Q. So you went with her back to 3519 South California?

A. Yes, with her and the children.



Q. What did she do when she went back on July 1st?

A. She had taken some black garbage –

Q. First of all, she had the key, right?

A. Yeah. She went in through the back. She – while I was waiting in the alley while she put some clothes and says she's going to get some clothes for the children and for herself.

Q. So so she used the key and entered the home?

A. Yes.

Q. Did she leave with anything?

A. Yeah she had like two or three baggies, what ever she could just grab real fast.

Q. And she went back to your apartment house, correct?

A. Yes, sir, she did.

Q. And she left the bags – by the way, what was inside the bags?

(p. 41) A. Clothing.

Q. She moved those to your house, correct?

A. Yes.

Q. Now, did she take everything she owned from the apartment at 3519?

A. No. I – I've got a two door car. She just took clothes. It was real fast. Just to get some clothes.

Q. Now, what items if you know did she leave behind when she owned?

A. All her furniture.

Q. Anything else?

A. Her personal – all her personal things like her bills and – just everything. It was just getting the clothing. Her stove, refrigerator, table and chairs. Her couch that opens up to a bed, it was a sofa. The childrens bed and like a – maybe a three piece dresser.

Q. Dishes?

A. Her dishes, the china my mom had given her.

Q. At any time between July 1, 1985 and July 26, 1985, did she ever return to that location to retrieve the property you have just mentioned?

A. No. no. She would just go back there.

Q. Now, did you have a discussion about her move back with you?

(p. 42) A. On July 1st, that's when we moved her back.

Q. Okay. When you spoke to her, who else was present? Did – just you and her?

A. Yeah.

Q. This was at your house?

A. Yes.

Q. And where – what, if anything did she say about moving back with you?



A. She said that Ed wanted the children – you know the baby was like about maybe not quite two years old because she would have been two in September. That he was getting irritated the fact that she was still on the bottle. The baby was still on the bottle and the diaper. And she was coming back – because he wanted the baby bottle broken and potty trained.

Q. And what would happen after the baby was bottle broken and potty trained?

MR. REILLEY: I'll object to –.

MR. BIGONESS: According to Miss Fisher.

THE COURT: Overruled.

MR. BIGONESS:

Q. What did Miss Fisher say would happen after the baby was potty trained and bottle broken?

A. That's the purpose of coming back home.

(p. 43) Q. What was she going to do after that point was reached?

A. She wasn't going to stay by me because it wasn't agreed she would continue to stay by me.

Q. Where would she g–, according to you?

A. She'd have to go back to her apartment.

Q. Now, directing your attention to July 26, 1985, did you see your daughter, Gail Fisher, on that date?

A. July what.

Q. July 26?

A. July 26th. That was on a Friday?

Q. I'm sorry. I don't know.

A. Okay. The 22nd was on a Monday, so it was a Friday.

THE COURT: What are we talking about, July –

THE WITNESS: 26th

THE COURT: 1985?

THE WITNESS: Yes.

MR. REILLEY: Judge, I'll stipulate it was a Friday.

THE WITNESS: Okay. She brought the children, you know. I had the children. Okay.

MR. BIGONESS:

Q. Well first of all let's back a day. On the 25th was she still living with you?

(p. 44) A. She was sleeping there.

Q. All right. Were there any nights between July 1st and July 26th when she did not return home to stay at your home?

A. On July 22nd, she left with the children. You know after – usually, she got off work about 4:00, 4:30. She left with the children. And she was going to meet Ed. And that night, Ed Rodriguez called me up and he was like out of breath saying, "Is Gail there? Is Gail there?" And I said well she went by you. And I said are you okay. Is everything okay and he hung up. A few minutes later Gail called me. I said, "Gail I thought you said you were



by Ed's." And she says – I said, "He just called." And she wanted me to say what I had cooked like she was being questioned about what I had cooked, was she really in the house and –

THE COURT: Ask another question.

MR. BIGONESS:

Q. Miss Jackson, at any time between July 1st and July 26, did Miss Fisher, to the best of your knowledge visit Edward Rodriguez at his apartment at 3519 South California?

A. Between July 1st and July 26th?

Q. Yes.

(p. 45) A. I believe so. I believe so because there were many times – .

MR. REILLEY: I'll object to that. What she believes.

THE COURT: Sustained.

THE WITNESS: She didn't always come home.

MR. BIGONESS:

Q. Now, directing your attention to July 26th, that would be the Friday, Miss Fisher was staying with you on that date, correct?

A. Right.

Q. And she got up in the morning?

A. She went to work.

Q. About what time did she go to work?

A. Between 8:30 and 9:00, or sometimes she would leave late and I'd say Gail –

THE COURT: One second. Let me ask this. Between July 1st and July 26th did the children always stay at your house.

THE WITNESS: No. No.

THE COURT: How many days were they away from your house?

THE WITNESS: She would sleep over night, but if she took – but if she could take –

THE COURT: How many days did they not – how many (p. 46) nights did she not sleep at your house with the children?

THE WITNESS: Between July 1st and July 26th?

THE COURT: Right. If you can remember. Approximate.

THE WITNESS: To the best of my knowledge, if it was like two or three – three times because sometimes she wouldn't come home.

THE COURT: Two or three times? How many nights if any, would your daughter Gail Fisher not stay, sleep overnight at your house between July 1st and July 26th?

THE WITNESS: Oh, Okay. That's hard to say, your Honor. Because –

THE COURT: More than once.

THE WITNESS: Sometimes she'd come home 4:00, 5:00 in the morning. That's not sleeping overnight.



THE COURT: How many times did she not come home to your house until 3:00 O'clock in the morning.

THE WITNESS: To the best of my knowledge, I'll say three to five times.

THE COURT: All right. Go ahead, Mr. Bigoness.

MR. BIGONESS:

Q. Now, on July 26, 1985, Miss Fisher appeared at your door, correct?

A. My back door.

Q. Okay. About what time was that?

(p. 47) A. It had to be between 1:00 and 3:00. More specifically, about 1:30 to 2:30.

Q. She appeared at which door?

A. She came up the back door. It was unlocked.

Q. And did you have a conversation with her on that date?

A. Yes. I –

Q. Who else was present?

A. The children were sleeping. They were taking their nap. I was alone in the kitchen and I heard someone walk up the back and –

Q. What if anything did Miss Fisher tell you at that time?

A. I just said, "You came home from work so early." And she said, "Mom, we have to talk." And that's when I

noticed her face. She already had the black eye from Monday.

Q. Can you describe her face?

A. Oh, God. It was terrible. I said, "My God, what happened to you?"

THE COURT: What did her face look like.

THE WITNESS: Her jaw was out to the side. She still had the black eye. And I really didn't look because I was upset. I was really upset but I did see her face was every distorted. Jaw bone was out to the side. She still had a (p. 48) black eye.

MR. BIGONESS:

Q. Then you had a conversation with Miss Fisher?

A. I said, "What happened?" She says, "Mom, we have to talk."

Q. Did you then talk to her?

A. Yes.

Q. What did she tell you?

A. She told me Ed Rodriguez had beat her.

Q. Did she go onto describe how the beating took place?

A. No, because I says, "Well, I'm calling the police again." I had called them Monday. I had called them –

Q. Okay. But on the 26th you then called the police –



A. I called the police. I said something's got to be done.

Q. Did the police subsequently arrive?

A. Yes they did.

Q. About what time did they arrive, if you recall?

A. From whatever time I called them it didn't take long. Five or ten minutes. I only called them one time and I probably would have called them again if she didn't come –

MR. REILLEY: Objection.

(p. 49) THE COURT: Just listen to the question and answer only the question that your [sic] listening to. Next question.

MR. BIGONESS:

Q. Now, did and [sic] Officer arrive after you called the police, right?

A. Yes, sir.

Q. That was a uniformed officer or plain clothes?

A. Regular policeman. Police car.

Q. Wearing his police gear?

A. Right.

Q. And do you remember that officer name, by any chance?

A. No, I don't.

Q. Could it have been Officer Tenza is that –

A. That sounds familiar but I really wouldn't really know his name.

Q. Now, other police officers arrive shortly thereafter?

A. Yes. He made a call to get some help.

Q. Which officers were they, if you recall?

A. Now, those I remember. It was Officer Entress, Jim Entress and Rick Gutierrez.

Q. Now, when those officers arrived, a conversation took place between Gail Fisher and the police officers, (p. 50) correct?

A. Right

Q. And you were present for that conversation?

A. Yes, sir, I was.

Q. And to the best of your recollection, what did Gail Fisher tell the police officers?

A. She told them what happened.

Q. What did she actually say, though?

A. She said that he had beat her up. And –

Q. Did she name the person that beat her up?

A. Yes. Ed.

Q. All right. And what else did she say, if you can recall? Tell the court exactly her words.

A. Okay. I was having company coming at the same time so I didn't get to hear everything, okay.



Q. Well, tell the court the parts you heard if you would?

A. Okay. She said that he beat her up and they wanted to know if she wanted to go over there and let them in. If she could let them in to get him. And she was hesitant and they said why has he got some – I'll use a difference word –

Q. What is the word the officer said?

A. Well, I – I don't talk that way. I don't want to (p. 51) say it, but another word for has he got crap in the apartment or drugs you know. And she says – just looked at them and then she said yes. And I said I believe he had it too. And that's why she was afraid to go –

THE COURT: Next question.

MR. BIGONESS:

Q. Now, when – did – well, strike that question.

You then entered a police car with the officers which had responded, correct?

A. Yes. My friend came over and I left him watching the babies.

Q. Then, you got in the police car?

A. Yes.

Q. You went over –

A. Gail and I went –

THE COURT: Let him ask the question.

Ask the question. Listen to his questions.

MR. BIGONESS:

Q. You entered the police car and you drove to 3519 South California, correct?

A. Yes, sir.

Q. Once you arrived there, what did you see your daughter Gail Fisher do?

A. My daughter and I got out of the squad car and we (p. 52) went to the front door and Gail put the key and opened up the door and pushed door back. Took the key and I stayed by her until we both got in the squad car.

Q. Were there officers with you when your daughter opened the door?

A. Yes, sir.

Q. Which officers were they, if you recall?

A. It was Officer Entress Gutierrez and the officer that first came in the police uniform.

Q. Which officers went to the front door?

A. I know the two fact, Entress and Gutierrez did. I think the other officer went to the back door and it was locked, so he came back.

Q. Okay. Thank you.

And you testified that you went to the squad car and had a seat?

A. Yes.

Q. And then, – well what did you see when you went back to the police car?



A. Well, we – I think it was like about five or ten minutes and then, –

MR. REILLEY: I'll object to – at that time this point. I believe it's beyond the scope of the motion.

THE COURT: Let her finish her answer to this question.

(p. 53) THE WITNESS: It was about five, ten minutes. Ed Rodriguez came out handcuffed with the officers gave us a dirty look.

MR. REILLEY: Ask that that be stricken, Judge.

THE COURT: Overruled.

THE WITNESS: That's what I said.

THE COURT: Next question.

MR. BIGONESS: Just one more question Miss Jackson.

During the time that your daughter was conversing with the police officers, did you ever hear her refer to the apartment at 3519 South California –

MR. REILLEY: Objection to leading question that's about to happen, Judge.

THE COURT: Sustained. Ask simply a question in terms of how she referred, if at all to the apartment, on California.

MR. BIGONESS:

Q. Miss Jackson did you ever hear your daughter refer to the apartment at 3519 South California? Did you ever hear her talk about it?

A. About her home?

Q. About 3519 South California?

A. That was her home.

Q. Did she ever refer to the apartment, though? Did (p. 54) she ever mention it when she was talking to the police officers?

A. That's where she was living with him.

Q. The answer is, "Yes" then, correct?

A. Yes. That's where she was living with him.

Q. Did she ever refer to it as his apartment?

A. No.

Q. How did she – whose apartment was it in her conversations with the police officers.

THE WITNESS: Our apartment.

MR. BIGONESS: Nothing further your Honor.

REDIRECT [sic – CROSS] EXAMINATION

BY MR. REILLEY:

Q. Miss Jackson the morning of July 26, 1985, that being the date that Mr. Rodriguez was arrested?

A. Yes.

Q. You said you saw your daughter that day – I'm sorry about 1:30 or so in the afternoon, is that correct, approximately?



A. Yes, sir.

Q. Prior to that time and date, when was the last time you you saw your daughter? Do you understand my question?

A. Oh, yes, sir.

(p. 55) Q. Prior to seeing her coming up and you saw the injury that you have described, when was the last time you saw her before that?

A. That morning.

Q. What time?

A. When she was supposed to be going to work probably around – between 8:30 and 9:00 o'clock.

Q. All right. Is it a safe assumption then she slept in your home on July 25, 1985 is that correct?

A. Give me time to think. Yes.

Q. In other words the day before, she stayed over at your house?

A. Yes.

Q. How about the day before that?

A. The day before that too, she got up and went to work.

Q. Okay.

A. Now Thursday, okay. I'm trying to say the day. When you say the day before that I want to be specific. Thursday, yes she went to work.

Q. Okay. By that she went to work leaving from your residence, correct?

A. Right.

Q. To make no mistake about it, your residence is (p. 56) 3554 South Wolcott, is that correct?

A. Yes, sir.

Q. Now –

A. She didn't go to work Thursday.

Q. Just listen to my question though, okay?

I believe Honor [sic] Honor, Judge Schreier, asked you a question. I'm not quite sure I understand your answer, so I'd like to just clarify something.

A. Okay.

Q. On July 1, 1985, I believe it's your statement, your testimony, that your daughter, Gail Fisher brought the two children over to your residence that you had some conversation and that at that point for that period of the month of July of last year, she was living with you with her children, is that a fair statement?

A. From July first –

Q. Is that correct?

A. Is when she brought the clothes.

Q. That's when you went back – did you go over there with her to get the clothes?

A. Yes, sir.



Q. All right. So, am I correctly describing this? That she move back in with you, is that correct?

A. She took three bags of clothes. That's all.

(p. 57) Q. Did she stay in your house from July 1, 1985 until the morning of July 26, 1985, the incident in question, did she stay there every night whether it was midnight or 3:00 in the morning?

A. On and off for those three weeks, sir.

Q. During that three weeks or three and a half weeks period of time, were there any nights she did not come home at all?

A. I would have to say to the best of my knowledge like two or three nights.

Q. The rest of the times which would mean another twenty-three days, approximately she stayed over at your house is that correct?

A. Yes.

Q. How about the two children, were they there and on each and every evening between July 1st and July 26th?

A. Unless she stayed out with them overnight, no.

Q. You say perhaps you recall two or three times that she might not have come home until maybe 3:00 O'clock in the morning?

A. Right.

Q. But she did come home and sleep at your house, is that correct?

A. Yes.

(p. 58) Q. Even if it was –

A. Even if it was for a couple of hours you mean?

Q. Yes.

A. Yes.

Q. Did she have a bedroom in your residence?

A. No, sir.

Q. Where did she sleep?

A. She slept on the couch.

Q. Okay. Where did the children sleep?

A. I had a bed in one bedroom that my mom was staying with me, one of the daughters slept there. The other one slept on the floor on top of a mattress, because I didn't have the crib.

Q. Is Gail Fisher your natural daughter or step-daughter.

MR. BIGONESS: Objection.

THE WITNESS: She's not my daughter.

THE COURT: Overruled.

MR. REILLEY:

Q. She's your natural daughter?

A. No. I adopted her when she was three days old.

Q. By the way, you know who Edward Rodriguez is, don't you?



A. The man in the yellow shirt sitting next to you.

(p. 59) Q. You have known him for a long period of time?

A. I know him since October, '84.

Q. October of '84? Okay.

A. I think it was October, '84 when he first – I first saw him at my daughters apartment which he lived next door.

Q. Next door to who?

A. Next door to me.

Q. Did you ever hear your daughter, Gail Fisher, tell the police officers who were there at your residence on July 26, 1985, that she was the victim of a battery namely she was beaten by Mr. Rodriguez?

A. Gail didn't use that –

Q. Let me finish my sentence.

That she described what occurred at the apartment but that she told the police she didn't live there any longer but she used to live there?

Do you recall her saying that?

A. She didn't say that.

Q. She didn't say it?

A. No.

Q. You didn't hear all the conversation of Gail with the police because –

A. Gail doesn't talk –

(p. 60) Q. Let me finish my question and I'll let you answer.

A. Okay, sir.

Q. You weren't present for everything Gail Fisher said to the police on that morning, is that true?

A. I was right in the front room.

Q. Did you hear everything she said?

A. About 99 and nine tenths because I had to open the door and let this man in.

Q. That means you didn't hear everything she said, is that true?

A. Go ahead. You got it.

Q. Is that true.

THE COURT: She said 99 and nine tenths.

MR. REILLEY: Yes, sir.

Well, Miss Jackson just one last question. It is in fact true that Gail Fisher was living with you on July 26, 1985, is that correct?

A. She slept there sometimes.

MR. BIGONESS: Objection.

MR. REILLEY: Thank you.

MR. BIGONESS: Objection calls for a conclusion.

THE COURT: "She slept there sometimes" will stand as the answer.



MR. REILLEY: Let met [sic] ask this. "Sometimes" means out of (p. 61) that twenty-six day period –

MR. BIGONESS: Objection to "sometimes." Speaks for itself.

THE COURT: Wait a second. You're a witness, miss.

THE WITNESS: I know but –

THE COURT: Now, you're going to – your commentary is not asked for nor wanted.

THE WITNESS: Okay. Thank you.

MR. REILLEY: I have no further questions.

THE COURT: Past testimony has already specified in detail exactly what was meant by that phrase.

MR. REILLEY: Yes, sir. I have nothing else, Judge.

MR. BIGONESS: No redirect.

THE COURT: Step down. Is there another witness today?

MR. REILLEY: No, sir.

THE COURT: Okay. Let [sic] give it a date then for further witnesses in this matter.

What date Mr. Reilley do you suggest?

MR. REILLEY: May I just check here. If your court calendar would permit something right after the Labor Day weekend.

THE COURT: How is September 4th? Do we have anything set that day or the 5th for that matter. The 4th or 5th, I (p. 62) would say, Mr. Reilley.

MR. REILLEY: I have a couple of matters in the building on the 4th, but I think one might be another motion so the 5th would be better for my schedule.

THE COURT: That's fine. By agreement, September 5th to conclude the motion.

MR. REILLEY: Thank you, Judge.

THE COURT: All right. Thank you.

(whereupon the above-entitled cause was continued to the 5th day of September, A.D., 1986)

---



(p. 64) STATE OF ILLINOIS )
) SS:
COUNTY OF COOK )

IN THE CIRCUIT COURT OF
THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS | ) | Case No. 85-C-10942 |
| vs. | ) | Charge: Del. Ctr. Subs. |
| EDWARD RODRIGUEZ | ) | |

*MOTION TO SUPPRESS EVIDENCE*

REPORT OF PROCEEDINGS had before the HONORABLE JAMES M. SCHREIER, Judge of said court, on the 5th day of September, 1986.

APPEARANCES:

HONORABLE RICHARD M. DALEY,
State's Attorney of Cook County, by:

MR. THOMAS GIBBONS,
Assistant State's Attorney,
appeared for the People;

MS CHRISTINE CURRAN,
appeared for the Defendant.

Mary M. Flagg, CSR
Official Court Reporter
2650 S. California Avenue
Chicago, Illinois 60608

* * *

(p. 66) GAIL FISCHER,

a witness called on behalf of the Petitioner-Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CURRAN:

Q Miss Fischer, would you please state your name and spell your last name for the court reporter?

A Gail Fischer, F-i-s-c-h-e-r.

Q And Miss Fischer, where do you live?

A 3725 South Paulina.

Q Who do you live there with.

MR. GIBBONS: Judge, I will just object as to her current living situation. I'm sorry her address came out.

THE COURT: Sustained as to who she currently lives with.

BY MS. CURRAN:

Q Drawing your attention to July 1, 1985, Miss Fischer, where did you live on that day?

A With – I moved in with my mother that day.

(p. 67) Q Immediately prior to moving with your mother on that day where did you live?

A 3519 South California.

Q And who did you live there with at that time?

A Edward.

Q What's the last name, please?

A Rodriguez.

Q Do you see him in court?



MR. GIBBONS: Stipulate to the identification, Judge.

THE COURT: So stipulated.

BY MS. CURRAN:

Q Did anyone else live there beside you and Mr. Rodriguez?

A My two children.

Q Now on July 1, 1985 what happened unusual, if anything?

A My friend came over and she helped me get all my clothes out of his apartment.

Q Your friend came over to Mr. Rodriguez' house, and about what time of day was that on July 1?

A Maybe around 6 o'clock.

Q That's in the –

A Evening.

(p. 68) Q P.M.

A Yeah.

Q And you removed your clothes, is that right?

A Yes.

THE COURT: This is July 1, 1985.

MS. CURRAN: That's correct, Judge.

Q And did you remove your children's clothes?

A Yes.

Q And from 3519 South California where did you go?

A 3554 South Wolcott.

Q Who lives there?

A My mother.

Q And did you move in with her mother on that date?

A Yes.

Q When you left 3519 South California on July 1, 1985, did you have a key to the apartment on California?

A No. I left – No.

Q What did you do with the key that you had been using?

A I left it in the apartment.

Q Now drawing your attention to July 26, 1985, (p. 69) what, if anything, happened on that day?

A We had an argument.

Q Who do you mean by we?

A Me and Ed.

Q And after the argument what did you do?

THE COURT: May we know where the argument took place on July 26?

MS. CURRAN: I'm sorry, Judge.

Q Where did the argument take place on that date?

A 3519 South California.

Q That was Mr. Rodriquez' apartment?

A Yes.

Q And after the argument what did you do?

A Went home.

Q By home, what address are you talking about?



A 3554 South Wolcott.

Q That's where you were living with your mother, is that right?

A Yes.

Q And what did you do when you got to your home?

A Walked in the house and my mother asked me what had happened.

(p. 70) Q Did you do anything after you got to your mother's house?

A She called the police.

Q And did the police come to your mother's house?

A Yes.

Q And when the police came to your mother's house then what happened.

I'm sorry. Go ahead.

A Then we went to Mr. Rodriguez' apartment.

Q Who went to Mr. Rodriguez' apartment besides yourself?

A My mother, the police officer, Jim Entress (phonetic spelling) and Rick Gutierrez.

Q How many police officers were there?

A When we first got there there were – The three and then I think there might have been another one that came after.

Q Did you tell any of those police officers on July 26, 1985 that you were living at 3519 South California?

A No.

Q Before you left your mother's house on July 26 did you have a key to Mr. Rodriguez' apartment?

(p. 71) A Could you repeat the question.

Q Before you left your mother's house on July 26, 1985 did you have a key to Mr. Rodriguez' apartment?

A Was this – After the police came?

Q Yes?

A Yes.

Q When did you get that key?

A That day when I left his house.

Q Who do you mean by his.

Q Mr. Rodriguez' house?

A Yes.

Q You took the key from Mr. Rodriguez' apartment, is that right?

A Yes.

Q Where was the key?

A On his dresser.

Q Did Mr. Rodriguez give you the key?

A No.

Q Was he present in the room when you took the key?

A Not in the room.

Q Did you tell him that you were taking the key?

(p. 72) A No.

Q Did he give you permission to take the key?

A No.

Q Now back to your mother's house on July 26, 1985, prior to going over to Mr. Rodriguez' house on that day did you sign any complaints against him for battery?



A I don't remember.

Q Did you go to Mr. Rodriguez' house straight from your mother's house?

A Yes.

Q Do you remember before you left your mother's house whether or not you signed any papers?

A I don't really remember.

Q Now when you went to 3519 South California on that date what happened?

A I let the police in and I went –

Q Now how did you let them in?

A With the key that I had taken off his dresser.

Q That was the key that you had taken earlier that day?

A Yes.

Q At any time on July 26, 1985 did you tell the (p. 73) police any of the those police officers that you lived at 3519 South California?

A No.

MS. CURRAN: I believe I have no further questions at this time, Judge.

THE COURT: Cross-examine.

CROSS EXAMINATION

BY MR. GIBBONS:

Q Miss Fischer, how long have you known the defendant here?

A About two and a half years.

Q And at some point at least you were living – sleeping and living with your kids in the apartment with him, is that correct?

A Yes.

MS. CURRAN: Judge, I'm going to object to "at some point".

THE COURT: Yeah. See if you can be specific at least in terms of a month Mr. Gibbons.

MR. GIBBONS: Judge, I was going to do that with my next few questions if I had an opportunity.

Q Were you living with him in the apartment at some point, ma'am?

A Yes.

(p. 74) Q And when was that?

A I moved in December of '84.

Q December of 1984?

A Yes.

Q Were you living there in December of '84?

A Yes.

Q Were you living there in January of '85?

A Yes.

Q February of '85?

A Yes.

Q March of '85?

A Yes.

Q And April of '85?

A Yes.

Q May of '85?

A Yes.

Q June of '85?



A Yes.

Q And during all that time that you lived there you were there with your children, is that correct?

A Yes.

Q And how many children were you there with?

A Two.

Q And what are their names?

(p. 75) A Jennifer and Jacqueline.

Q After during that time period you had an stove, refrigerator there. Stove and refrigerator?

A Yes.

Q You had a table and chairs there?

A Yes.

Q Did you have a –

MS. CURRAN: I'm going to object to this. This is beyond the scope of my district exam.

THE COURT: Overruled.

BY MR. GIBBONS:

Q Did you have a couch that opened up like a bed there?

A It was my ex-husband's.

Q Well you had a couch there that opened up like a bed?

A It didn't belong to me.

Q Well who put the couch in there?

A Ed had bought it off of my ex-husband.

Q And did your children have a bed there?

A Yes.

Q And was there any dressers there belonging to you and your children?

A The Children, yes.

(p. 76) Q What about dishes? Were the dishes there?

MS. CURRAN: Judge, I'm objecting on the ground that anything that happened before July 1, 1985 is beyond the scope of my direct and it's not relevant.

THE COURT: Well, it might not – It might end up to be not relevant but I imagine that it's going to be tied in.

BY MR. GIBBONS:

Q Were your dishes there, ma'am?

A Yes, I had some china there.

Q Now on July 1 you and the defendant here, there was a fight between you – between the two of you, correct?

A On what date?

Q June 30, July 1, right in that time?

A No. That was just the day that I moved out.

Q At some point prior to your moving out moving out he beat you up, correct?

MS. CURRAN: Objection, Your Honor. I don't know the scope and issue.

THE COURT: Overruled.

BY MR. GIBBONS:

Q That's right?

A We had an argument.

(p. 77) Q Well, didn't you move out because he beat you up?



A Because we used to fight.

Q And in fact, he physically beat you up at about on or around July 1, correct?

A No.

Q When did he beat you up?

A The –

MS. CURRAN: Objection, Judge. She didn't say that he beat her up. That's putting words in the witness' mouth.

THE COURT: She can deny it if it never did exist but you were about to answer. You may answer.

BY MR. GIBBONS:

Q Did he beat you up, ma'am, or not?

A The end of July?

Q What about at the beginning of July or the end of June?

A No.

Q He never beat you up before the end of July, is that right?

A We had fights.

Q Where he hit you, correct?

A He'd slap me.

(p. 78) Q And it was because of his slapping you and fighting with you that you moved out, according to you anyway, on July 1?

MS. CURRAN: Objection, Judge. Why she moved out is totally irrelevant.

THE COURT: Sustained.

BY MR. GIBBONS:

Q Well on July 1, ma'am, when you say you moved out you took clothes with you, is that right?

A Yes.

Q And clothes for your kids?

A Yes.

Q Did you leave behind a stove.

MS. CURRAN: Objection. Asked and answered.

THE COURT: Overruled.

BY MR. GIBBONS:

Q Was the stove still there?

A Yes.

Q Was the refrigerator still there?

A Yes.

Q Were the dishes, the china that your mother gave you, was that still in the apartment?

A Yes.

Q Was the dressers that you and your children (p. 79) used, were they still in the apartment?

A Yes.

Q So the only thing that you moved out of the apartment at that time was clothing, is that correct?

A Yes, that's correct.

Q Everything else that you owned was still in the apartment, correct?

A Yes.

Q Now between July 1 and July 26 you were back at the apartment, were you not?



A Yes.

Q And in fact you saw the defendant there almost every day, didn't you?

A Yes.

Q And in fact –

THE COURT: Saw him every day at the apartment?

BY MR. GIBBONS:

Q At the apartment, isn't that right?

A Yes.

Q And in fact sometimes you would be there late into the night, isn't that right?

A Yes.

Q And in fact on occasion you stayed over there, isn't that right, slept the night there?

(p. 80) A I don't really recall, but I believe I probably did.

Q Now prior to July 26, 1985, the defendant punched you in the face, didn't he, earlier in the week?

A Yes.

MS. CURRAN: Object as to prior.

THE COURT: Overruled. "Yes" will stand.

BY MR. GIBBONS:

Q And he gave you a black eye, didn't he?

A Yes.

Q And on July 25 of 1985 he beat you up so badly that he broke your jaw, isn't that right?

A It was the 26th.

Q On the 26th, in the morning of the 26th?

A Yes. Sometime during the day of the 26th.

Q Where did he beat you up, ma'am?

A 3519 South California.

Q That was the apartment where he was living?

A Yes.

Q And you were there with him at that time?

A Yes.

Q On July 26th?

A Yes.

(p. 81) Q And all of these personal items that belonged to you were they still there, the furniture and the refrigerator and the stove and beds and the dressers and the couch, were they all still in the apartment at that time?

A Yes.

Q And it was after he beat you up that you went over to your –

THE COURT: What bed is it you're speaking of, Mr. Gibbons again.

BY MR. GIBBONS:

Q Whose bed was in the apartment?

A I had one bed.

Q Which bed?

A The children's bed.

Q And was the mattress on the bed?

A I – I suppose.



Q Well the child slept on a mattress when she slept on the bed, didn't she?

A Yes.

Q Now after he beat you up in the apartment on California you went over to your mother on Wolcott, right?

A Yes.

(p. 82) Q And it was at that time that you decided to move the rest of the things that belonged to you from the apartment on California, correct?

A It was at what time?

Q After he beat you up on the 26th you decided to get your stuff out of the apartment, correct?

MS. CURRAN: Objection, Judge. There's no testimony about that. There's no testimony regarding her plans to move articles out of there one way or the other.

THE COURT: Well, rephrase your question, Mr. Gibbons, please.

BY MR. GIBBONS:

Q Well on July 26th when he beat you up at that time did you intend to take the rest of the things that you owned out of the apartment or were you still planning on leaving them there?

A Well I was planning on leaving them because I told him he could use the stove and fridge and tables since he had gotten rid of his to move mine in.

THE COURT: Your table was there, also?

A Yeah.

BY MR. GIBBONS:

Q And chairs?

(p. 83) A Yeah. I don't know about chairs.

Q Now you called the police or somebody called the police on July 26th, correct?

A My mother.

Q And when the police came you told the police that this man here had beat you up, correct?

A I think my mother told them.

Q Didn't you talk to the police at all when they came over there?

A Yes.

Q Is this Officer Entress and Tensa (phonetic spelling)?

A I don't know the police officers name that came over first.

Q Didn't the police officers ask you what happened to you?

A Yes, but –

Q Didn't you tell them that he had beaten you up?

A Yes, but my mother is very out spoken.

MS. CURRAN: Your Honor, I'm going to enter a continuing objection to counsel's characterization of the beating up and anything related to that.

THE COURT: What – A fractured jaw, that's a (p. 84) beating up.

MS. CURRAN: Your Honor, I think what the State is trying to do is they're trying to use this. This is a motion



to suppress items in a drug case, Judge. My client is not on trial for battery.

THE COURT: Objection overruled.

MR. GIBBONS: I think it's clearly relevant?

Q At the time the police officers asked you where the defendant was at, is that right?

A Yes.

Q And you told them he was over at the apartment on California?

A Yes.

Q And you told them you would take them over there, didn't you?

A Yes. They told me that was what I had to do.

Q They told you you had to do that?

A In order to –

Q Didn't –

THE COURT: In order to what?

A If I wanted to press charges.

BY MR. GIBBONS:

Q That that would be what you would have to do, take them over there, is that right?

(p. 85) A Yeah.

Q And you told them that you had a key to the apartment, right?

A Yes.

Q And you told them that you would let them into the apartment so that they could arrest the defendant, correct?

A Well they told me that's – That was what I had to do.

Q Did you tell them that you would do that or not?

A Well yes, I agreed to it.

Q You agreed to it. And in fact you went over to the apartment with the police, didn't you?

A Yes.

Q And you had the key with you, didn't you?

A Yes.

Q And you put the key in the lock and turned the lock and opened the door so the police could get in, didn't you?

A Yes.

Q And then you let the police go in and you stayed outside?

A Yes.

(p. 86) Q And you told the police that Mr. Rodriguez would be in there?

A Yes.

Q Probably sleeping in the bedroom, correct?

A I don't recall.



Q Now you say that you got the key – when was it, earlier in the day or something?

A Yeah, that day right before I left.

Q What time was that?

A In the afternoon. Maybe around two.

THE COURT: Had you had a key to the apartment at any time during July, between July 1 and July 26th?

A No.

BY MR. GIBBONS:

Q You say you got the key off the dresser?

A Yes.

Q. The defendant wasn't there at that time, Mr. Rodriguez here?

A Not in the room.

Q He didn't give you the key?

A No.

Q Do you remember testifying in a preliminary hearing in this matter on September 11, 1985?

A I don't –

(p. 87) Q Do you remember ever testifying in this matter before?

A Right after it happened I think in September.

Q You did testify in this matter?

A Yes.

Q And on that particular date do you remember – This is page 24. Do you remember an assistant state's attorney by the name of Mr. Zelezinski asking you who lived at the address on California and you said Ed does and then the question

"Q Does anybody else live there?

A No.

Q How did you get in?

A With a key.

Q Who gave you the key?

A He did."

Do you remember being asked that question and giving that answer?

A I don't really remember.

Q You don't remember that?

A No.

THE COURT: Counsel stipulate if the court reporter were called she would testify that the question was asked and the answer given according to (p. 88) her notes.

MS. CURRAN: Yes Judge.

BY MR. GIBBONS:

Q Now, since July 26th when this incident happened the defendant has – You have seen the defendant, have you not?

A Yes.

Q And you have been out with him on occasions since that time, haven't you?



A Yes.

Q And in fact you are still –

MS. CURRAN: Judge, I object to anything after July 26th. Not relevant to this matter.

THE COURT: Goes to any bias or interest in the outcome as it would pertain to any witness who testifies, the relationships with the defendant or any possible bias.

BY MR. GIBBONS:

Q Since July 26th you have had another argument with the defendant, haven't you?

A Probably had a few arguments.

Q And in fact in one of those arguments since that time he came through your friend's window, didn't he?

(p. 89) MS. CURRAN: Objection, Judge.

THE COURT: I'm not sure. Are you driving to a particular point?

MR. GIBBONS: Yes. I think the point is that –

THE COURT: Go ahead. Make your motion to strike at the end, Miss Curran, if it doesn't become material. It's a bench trial but if it were a jury I'd resolve it right now.

MR. GIBBONS: Thank you, Judge.

Q He came through your friend's window, didn't he? This defendant here?

A Yes.

Q And he came up to you and he used his fist to hit you in the face?

A Yes.

Q And in fact, he hit you so hard that your cheekbone was fractured in four place, isn't that correct?

MS. CURRAN: Continuing objection, Judge.

THE COURT: You may answer.

BY MR. GIBBONS:

Q Ma'am, isn't that right?

A Yes.

Q And in fact since July 26th when this (p. 90) incident happened there's been other instances beside the one where he fractured your cheekbone where he's hit you, isn't that right?

A I don't remember any.

Q Well I guess ma'am it's true, isn't it, that you are certainly afraid of this man here?

MS. CURRAN: Objection, Judge.

THE COURT: Overruled. That would certainly – If true that might certainly affect her testimony.

BY MR. GIBBONS:

Q Isn't that right, ma'am?

A At times.

Q Well you're afraid that if you testified against him that he would come over or somebody that he knows would, say, come over and get you, aren't you?



Aren't you afraid that if you testify against this defendant that somebody will come and get you, if not him?

MS. CURRAN: Objection to someone and come and get you.

THE COURT: Overruled.

BY MR. GIBBONS:

Q Ma'am?

(p. 91) A I don't know.

Q Well do you recall when you and I had an interview here prior to coming down to court? Do you remember that?

A Yes.

Q And I asked you questions and you talked to me, right?

A Yes.

Q And I asked you about what had happened during July, didn't I?

A Yes.

Q And you talked to me, right?

A Yes.

Q After that I asked you if you were afraid, didn't I?

A Yes.

Q And you told me that if you testified against this defendant that he would come after you and that you

were scared of him and that he'd come and get you and that if he didn't somebody else would?

A I didn't say if I testified against him.

Q You said you were afraid that he might come and get you, didn't you? Didn't you tell me that?

A Not if I testified against him.

(p. 92) Q What did you tell me, ma'am? Tell me what you told me.

A I just told you I was afraid of him when he gets mad.

MR. GIBBONS: That's all I have.

THE COURT: Miss Curran.

MS. CURRAN: Thank you, Judge.

MR. GIBBONS: Judge I just have one other thing if I may.

Q Since July 26th when the defendant got charged these defense lawyers have also come and talked to you, haven't they?

A Yes. I've talked to them.

Q Mr. Reilley and this lawyer right here, Miss Curran?

A Yes, I talked to Miss Curran.

Q And they went over what happened, right?

A Yes.

Q. And at that time they typed up an affidavit and had you sign an affidavit, right?



A. Yes.

MR. GIBBONS: By the way at that time that you signed the affidavit – Judge, I don't know where we're at in terms of exhibits, but I will identify (p. 93) this as People's Exhibit Number 1.

THE COURT: You may mark it People's respondents.

MR. GIBBONS: Respondent's.

Q Do you recognize that exhibit?

A Yes.

Q Is that a copy of the affidavit that you signed?

A Yes.

Q When you signed that affidavit in there it says "I had neither apparent or actual authority to permit the police to enter the defendant's apartment," does it.

MS. CURRAN: I'm going to object to this.

THE COURT: Sustained.

MS. CURRAN: It's hearsay.

BY MR. GIBBONS:

Q Ma'am, do you know the difference between actual and apparent authority?

MS. CURRAN: Objection, Judge.

THE COURT: I think this is anticipatory, Mr. Gibbons. Maybe when Miss Curran finishes her redirect examination maybe that line of questioning would be

proper but at this point it's improper. It's just hearsay. Has no probative value at this point.

(p. 94) MR. GIBBONS: Yes, Your Honor. I have nothing further.

THE COURT: Go ahead, Miss Curran.

REDIRECT EXAMINATION

BY MS. CURRAN:

Q Miss Fischer, you testified that when you moved out from Mr. Rodriguez on July 1 that you left various items such as a stove and refrigerator and some dishes at Mr. Rodriguez' house, isn't that right?

A Yes.

Q Now and you moved into your mother's house on July 1, isn't that right?

A Yes.

Q Did your mother have a stove?

A Yes.

Q Did your mother have a refrigerator?

A Yes.

MR. GIBBONS: Objection, relevance.

THE COURT: Overruled.

BY MS. CURRAN:

Q Did your mother have a refrigerator?

A Yes.



Q Did your mother have dishes?

A Yes.

(p. 95) Q And when you moved into your mother's house where did your two little girls sleep?

A On beds that my mother had.

Q Did they each have their own bed?

A Yes.

Q And where did you sleep?

A I slept on the couch.

Q Now when you were living with Mr. Rodriguez you did not have your own bed, isn't that right?

A Right.

Q Now when you moved on July 1, 1985 did you have access to a moving van or a truck of any sort?

MR. GIBBONS: Objection.

THE COURT: Overruled. You may answer.

BY MS. CURRAN:

Q I'll repeat the question for you. On July 1, 1985 when you moved out did you have access to a moving van or a moving truck of any kind?

A No.

Q And when you moved out Mr. Rodriguez did not have a stove of his own, isn't that correct?

A Yes.

Q And he did not have a refrigerator of his own, isn't that correct?

(p. 96) A Yes.

Q How did you get from 3519 South California to your mother's home on Wolcott on July 1, 1985?

A My friend drove me.

Q And what did she drive you in?

A Her car.

Q Was it an usual vehicle or was it a van?

A It was a car. Cadillac.

Q A Cadillac?

A Yes.

Q Now Miss Fischer, you and I have talked several times about their case, isn't that right?

A Yes.

Q And you came to my office on December 9, 1985, isn't that right?

A Yes.

Q And we talked about what happened that led to these charges, isn't that right?

A Yes.

Q And I always – I told you on December 9, 1985 that I anticipated you being a witness in this matter, isn't that right?



A Yes.

MR. GIBBONS: Judge, I would just object as to (p. 97) before you left the apartment?

MS. CURRAN: I'd like to know when.

MR. GIBBONS: On July 26th when you left.

A No.

Q How did you get out of the apartment?

A He let me out.

Q You had the key, is that correct?

A Yes. He had a couple sets of keys.

Q Why did you take the key then?

A Because in case he ever did that again, had me locked in I would have the key.

Q So that you could get back in, right? Isn't that correct?

A No. So I could get out if I was ever in.

MR. GIBBONS: I see. Okay. Thank you.

THE COURT: Just a couple of quick questions.

EXAMINATION

BY THE COURT:

Q Was your name on a lease in that apartment?

A No.

Q During July of 1985?

A No.

Q Did you ever contribute monetarially to any rent payments during that time June, July of 1985?

(p. 98) A No.

Q He always paid the rent?

A Yes.

Q A hundred percent of the rent?

A When I wasn't living there?

Q In July of 1985 and including June of 1985 did you make any payment directly or indirectly toward the rent?

A In June when I was living there.

Q And what was it you did in terms of rental payment for the June, 1985 rent?

A Well I never gave him money. It was just like my check we just used for whatever bills or groceries.

Q The July rent was due when? In June? When was the rent due?

A On the first of the month.

Q Did you make a contribution at all in the month of June of 1985 toward the July rent which was due on July 1, the first of the month?

A No.

THE COURT: Miss Curran, any questions?



MS. CURRAN: Nothing further. No, Judge.

MR. GIBBONS: Nothing further, Judge.

(p. 99) THE COURT: All right. Thank you. You are excused.

I do have just one other question.

Q During July of 1985 did you ever invite any of your friends, like the girlfriend you mentioned earlier in your testimony, to the apartment on California without the defendant being there?

A No.

THE COURT: Do you understand my question?

A Yes. I only went there to visit him.

THE COURT: Did you ever have any of your friends over while he wasn't there?

A No.

THE COURT: In July of 1985?

A No.

THE COURT: All right. Thank you. You may step down.

MS. CURRAN: Judge, if I may have one more on that.

THE COURT: Go ahead.

MS. CURRAN:

Q Miss Fischer, in July of 1985 did you ever go over to Mr. Rodriguez' apartment when he was not home?

A No.

(p. 100) MS. CURRAN: That's all for me, Judge.

THE COURT: Mr. Gibbons.

MR. GIBBONS: Nothing further, Judge.

THE COURT: Thank you. You may step down.

(Witness excused.)

THE COURT: Miss Curran, any further witnesses?

MS. CURRAN: No, Your Honor. I have nothing left but argument.

THE COURT: Mr. Gibbons.

MR. GIBBONS: Judge, we have nothing further. No other evidence to present at this time.

THE COURT: Both sides rest on the motion?

MR. GIBBONS: Yes.

MS. CURRAN: Yes, Judge.

• • •



STATE OF ILLINOIS )
) SS:
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| VS | ) | 85 C 10942 |
| | ) | Charge: Man. del. |
| EDWARD RODRIGUEZ | ) | Cont. Sub.) |

(Filed Dec 9, 1986)

REPORT OF PROCEEDINGS had at the hearing of above-entitled cause, before the Honorable James M. Schreier, Judge of said court on the 17th day of September, 1986.

PRESENT:

HON. RICHARD M. DALEY,
State's Attorney of Cook County, by
MR. THOMAS GIBBONS,
Assistant State's Attorney,
appeared for the People;

MS. CHRIS KERNS,
appeared for the Defendant;

• • •

(p. 138) THE COURT: Thank you, Mr. Gibbons.

Both arguments were very good in this case. In terms of the officers' relying on the apparent authority theory, with the support of People versus Adams, an out of state case, can be instructive if there is no controlling Illinois case. And there does seem to be a controlling (p. 139) Illinois case in People versus Miller.

What the Illinois reviewing courts would decide today based on the United State's Supreme Court cases cited by the State holds some doubt, leaves the question perhaps somewhat open, a crack in the door. But I think I am obliged to follow the present situation in Illinois which would not allow for police to act on the apparent authority of the person in allowing the search of an apartment, the person in this case being Gayle Fisher. Maybe that will change. It might change tomorrow.

The present state of the law does not allow for it and Adams can only be instructive and I think can only really be acted on and adopted by a reviewing court and not by the trial court, given the fact that there are Illinois reviewing court opinions on the subject.

Secondly, the actual authority test is a question, has points on both sides, on balance. I think that Gayle Fisher did not have actual authority to permit the search. And again, on balance and weighing the factors on both sides, the test is, I think, pretty well stated in People versus Posey, 9 Il. Ap. 3d, 9 Il. Ap. 3d, 943, wherein they cite United States versus Madlock; indicating common authority to consent rests on mutual property by persons generally having joint acce•s or control for most purposes.

(p. 140) So that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed their place – that one of their number might permit the common area to be searched; Madlock, U.S. 116 at 164.

In Posey, parenthetically, that was a situation where one of the main factors that the Illinois Appellate Court



relied on in determining that a co-inhabitant had authority to permit the FBI to search a motel room was that the female who allowed the search had no other residence in the Dallas area. Her exclusive residence – page 949 – her exclusive residence was the motel. And that's contrary to the facts in this case.

On Balance, I think some of the controlling factors which would disallow Gayle Fisher from allowing the police to search are, she was not a usual resident, let alone an exclusive resident at the California apartment. She was, indeed, a rather infrequent visitor or resident or guest or invitee. She was not on the lease and did not contribute to the rent.

The key question, I think is neutralized. I don't know what to think. She was substantially impeached as Mr. Gibbons points out at the preliminary hearing. But the fact that she said she had permission to have the key was only a (p. 141) prior inconsistent statement. It was not substantial evidence.

The testimony in the cause, though, was to me negated by the impeachment at the preliminary hearing. I don't know whether she got the key in the way she described or simply was given the key by Rodriguez. I don't know on the key.

Also, I think it is significant that Gayle Fisher apparently was not there when the Defendant was not there. She did not have access to the apartment without the Defendant being there as a guest who only has access to a place when his host was there.

And she apparently was not allowed, according to her testimony, to invite other people, friends or acquaintances there on her own. The fact that she testified she took the clothes with her is significant. And though she left other heavier articles behind, including things like dishes or china which she said she left behind as well, in addition to the clothes, she most importantly too [sic] her children with her.

And I think that also weighs the fact that she was not a usual resident again, let alone, an exclusive resident at the California apartment.

On balance, weighing factors contrary to and in (p. 142) support of, I think on balance, she did not have the right or control over that apartment to allow the police entry, allow them to search, there being no exigent circumstances that would afford an exception to Peyton versus New York.

The motion to suppress must lie. And the evidence is suppressed. The motion to suppress evidence, sustained.

I invite the State to make new law, which I think would be new law in terms of the apparent authority, or to review my deciding the balancing factors if they so desire.

MR. GIBBONS: Judge, could we have a check date on this.

THE COURT: Yes.

Mr. Gibbons, how long do you think it will take you to review it?



MR. GIBBONS: About 3 weeks. We have to get at least one more transcript. My supervisor would want to read over the testimony which was heard.

THE COURT: If he is not a judge himself by that time. Three weeks, that should be nought time.

MR. GIBBONS: Will that be by agreement?

MS. KERNS: Yes.

THE COURT: By agreement, 10-7-86 to determine whether or not the State will take an appeal.

(Said proceedings adjourned, to (p. 143) resume 10-7-86).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

vs.

EDWARD RODRIGUEZ,

Defendant-Appellee.

---

ORDER

The defendant, Edward Rodriguez, was arrested on July 26, 1985, and charged with possession of a controlled substance with the intent to deliver. He was charged on the basis of certain items of physical evidence seized during a warrantless search of his apartment that was conducted pursuant to the consent of a third-party. The trial court granted defendant's motion to quash his arrest and suppress evidence, holding that the party who consented to the entry into defendant's apartment was without authority to do so. The State appeals from this order questioning whether consent to enter was properly given.

The trial court heard defendant's motion to suppress evidence on the grounds that the party who consented did not have the authority to consent because she was not living at defendant's apartment at the time that she consented to the entry. At the hearing, Officer James Entress testified that on July 26, 1985, at about 2:30 p.m. he and



his partner, Officer Ricky Gutierrez, received a call from Officer Tenza asking for assistance at a residence located at 3554 South Wolcott. Upon arriving, Officer Entress had a conversation with Gale Fisher. Also present during this conversation were Officer Tenza, Officer Gutierrez, and Dorothy Jackson (Fisher's mother). Fisher told Officer Entress that earlier in the day defendant had beaten her at their apartment at 3519 South California and that she wanted to make a complaint. She also indicated that she had been living at that apartment, that her clothes and furniture were in that apartment, that defendant was presently asleep there, and that she had a key to the apartment and would let the officers enter to arrest defendant. During direct examination, Officer Entrees acknowledged that he had testified at a preliminary hearing that Fisher had told him that she used to live at the apartment on South California. However, he went on to say that it was his impression that she was still living there at the time she agreed to let them into the apartment. Officer Entress testified that during his conversation with Fisher he told her that they would only arrest defendant if Fisher was certain that she wanted to press charges against him, and that she seemed hesitant about signing a complaint. Having recalled a conversation with someone a year earlier concerning the involvement of an individual named Edward Rodriguez with narcotics, Officer Entress asked Fisher if defendant was involved with narcotics and Fisher would not respond to that question. Officer Entress testified that he, Officer Gutierrez, Fisher and her mother proceeded to the apartment on South California. Fisher opened the door with her key and allowed the officers to enter. Officer Entress first entered

the living room where he observed containers of a substance he believed to be cocaine and drug paraphernalia including pipes and scales. He then proceeded to the bedroom where he observed defendant sleeping on a bed. In the course of waking defendant, Officer Entress saw two open briefcases at the side of the bed that contained a white substance that he believed to be cocaine. Defendant was subsequently arrested. On cross-examination, Officer Entress testified that Fisher used the term "our" and "their" when referring to the apartment on South California.

Dorothy Jackson testified that on July 1, 1985, she drove her daughter to the apartment on South California at the latter's request so that she could remove her clothes from the apartment. She removed several bags of clothing and left behind her stove, refrigerator and some furniture. Ms. Jackson testified that her daughter told her that she was staying with her because defendant wanted one of their two children toilet trained. She stated that since there was no agreement that Fisher and the children would stay with the witness, Fisher would have to return to her apartment on South California after the child was trained. According to Ms. Jackson, her daughter and her children stayed with Jackson from July 1 through July 26, 1985. During that time Fisher visited defendant and, on approximately two or three occasions, spent the night at his apartment. She also stated that the apartment on South California was Ms. Fisher's home. In the afternoon of July 26, Fisher went to Ms. Jackson's house and told her that defendant had beaten her, whereupon Ms. Jackson telephoned the police and Officer Tenza arrived a few minutes later.



Fisher testified that she lived with defendant at the apartment on South California from December 1984 through June 1985, and that she moved in with her mother on July 1, 1985. When she moved in with her mother, she left the key at defendant's apartment. She stated that she did not have a key to defendant's apartment from July 1 to July 26 and that defendant would let her into the apartment when she went to visit him during that time. She did take a key from defendant's dresser on July 26, after she and defendant had argued. During July 1985 she never had any friends at the apartment on South California, she only went there to visit defendant, and she never went there when defendant was not in the apartment. According to Fisher, she did not remove her stove, refrigerator and furniture that her name was not on lease and that defendant always paid the rent on the apartment. Fisher stated that although she did tell Officer Entress that she had a key to the apartment and agreed to let him inside, she also indicated that she did so because the police told her that that is what she had to do if she wanted to press charges. She denied telling Officer Entress on July 26 that she was living in the apartment on South California.

Our review of the trial court's decision to grant defendant's motion to suppress, recognizes that its ruling will not be set aside unless clearly erroneous. (*People v. White* (1987), 117 Ill. 2d 194, 512 N.E.2d 677.) We note at the outset that this case involves a consent to enter and not a consent to search, and that case law regarding third party consent commonly involves consent to search. However, the concept of consent to search is fundamentally intertwined with the concept of consent to enter

since the validity of a warrantless seizure of evidence in plain view depends on the validity of the entry by the officers seizing the evidence. Therefore, the application of that case law to the instant case is both proper and relevant. In determining whether Fisher had the authority to consent to the warrantless search of defendant's apartment, we are guided by the rule set forth in *United States v. Matlock*, (1974), 415 U.S. 164, 171, 39 L.Ed.2d 242, 94 S.Ct. 988, which involved a consent to search. In that case, the United States Supreme Court ruled that "when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other significant relationship to the premises or effect sought to be inspected." The Supreme Court explained the term "common authority" as follows:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, * * * but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed that risk that one of their number might permit the common area to be searched." *United States v. Matlock*, (1974), 415 U.S. 164, 171, n.7.

The Illinois Supreme Court adopted this common authority doctrine for cases involving third-party consent in



*People v. Stacey* (1974), 58 Ill. 2d 83, 317 N.E.2d 24. In that case the defendant's wife who was jointly occupying a house with the defendant, allowed police to remove a shirt from defendant's dresser drawer that was located in their bedroom. The court concluded that the mere fact that the defendant alone may have used a dresser drawer while his wife may have used another did not indicate that the wife was denied the mutual use, access to or control of the drawer.

The application of this doctrine requires a determination as to whether the consenting party had sufficient common authority to consent to the entry of the premises where the evidence was found in plain view. (*People v. Callaway*, (1988), 167 Ill. App. 3d 872, 522 N.E.2d 337); *People v. Posey* (1981), 99 Ill. App. 3d 943, 426 N.E.2d 209.) The third-party consent to enter must be made from a person who has control over the premises. (*People v. Daugherty* (1987), 161 Ill. App. 3d 394, 514 N.E.2d 228.) In reviewing the record in the instant case, we note that the trial court properly rejected the State's contention that Fisher had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority. (*People v. Vought* (1988), 174 Ill. App. 3d 563, 528 N.E.2d 1095); *People v. Bochniak* (1981), 93 Ill. App. 3d 575, 417 N.E.2d 722. We also agreed with the trial court's finding that Fisher lacked sufficient authority to justify the police action because under the common authority doctrine set out in *Matlock* her consent was not valid. In reaching its determination the trial court mentioned the following

factors established by the evidence as controlling: (1) Ms. Fisher's name was not on the lease and she did not contribute to the rent; (2) defendant's apartment was not her exclusive or even her usual place of residence, rather, she was an infrequent visitor, guest or invitee; (3) she did not have access to the apartment when defendant was not there and, like a guest, she only had access when defendant was present; (4) she never brought people over to the apartment; and (5) she moved her clothes, and more importantly, her children to her mother's residence. All of these factors indicate that Fisher did not have the common authority over the defendant's apartment that was necessary to make her consent to enter valid. The fact that the evidence seized was in plain view does not change the outcome of this case because the plain view doctrine is dependent upon an original lawful entry (*People v. Patrick* (1981), 93 Ill. App. 3d 830, 417 N.E.2d 1056), and we have held the evidence does not contravene the conclusion that the original entry was unlawful. Therefore, the trial court's decision to grant defendant's motion to suppress was proper.

For the reasons set forth above, the judgment of the circuit court is affirmed.

Judgement affirmed.

FREEMAN, P.J., with MCNAMARA and WHITE, JJ., concurring.

---



ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 5, 1989

Hon. Richard M. Daley
State's Attorney, Criminal Appeals Div.
309 Richard J. Daley Center
Chicago, IL 60602

No. 68295 – People State of Illinois, petitioner, v. Edward Rodriguez, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 27, 1989.

---

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 30, 1989

Ms. Inge Fryklund
Assistant State's Attorney
Rm. 309 Richard Daley Center
Chicago, IL 60602

Re: Illinois,
v. Edward Rodriguez
No. 88-2018

Dear Ms. Fryklund:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
Joseph F. Spaniol, Jr., Clerk

No. 88-2018 (6)



In The

# Supreme Court of the United States

October Term, 1989

THE STATE OF ILLINOIS,

*Petitioner,*

vs.

EDWARD RODRIGUEZ,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois First District**

## BRIEF FOR PETITIONER

NEIL F. HARTIGAN,
Attorney General
State of Illinois
ROBERT J. RUIZ,
Solicitor General
State of Illinois
TERENCE M. MADSEN,*
Assistant Attorney General
100 West Randolph Street,
Suite 1200
Chicago, Illinois 60601

*Attorneys for Petitioner*

**Counsel of Record*

CECIL A. PARTEE,
State's Attorney
County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
RENÉE GOLDFARB,
PAUL GLIATTA,
Assistant State's Attorneys
*Of Counsel.*

43pp

## QUESTIONS PRESENTED

I.

Whether a police officer's good faith reliance on a third party's apparent authority to permit a consensual entry is a valid exception to the warrant requirement of the Fourth Amendment, in the alternative, whether the good faith exception to the exclusionary rule should be applied.

II.

Whether Gale Fisher possessed actual authority under *United States v. Matlock* to permit a consensual entry.

## TABLE OF CONTENTS





## TABLE OF CONTENTS – Continued

## TABLE OF AUTHORITIES

Page

CASES





## TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued

No. 88-2018

In The

# Supreme Court of the United States

October Term, 1989

THE STATE OF ILLINOIS,

*Petitioner,*

vs.

EDWARD RODRIGUEZ,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois First District**

## BRIEF FOR PETITIONER

## OPINION BELOW

The Order of the Illinois Appellate Court, First Judicial District is unreported and is reproduced in the Joint Appendix to this Brief at 98. Report of Proceedings containing the trial court's findings on respondent's motion to quash arrest and suppress evidence is not reported and is reproduced in the Joint Appendix to this Brief at 93. The Order of the Illinois Supreme Court of April 5, 1989 denying petitioner's Petition for Leave to Appeal is reported at 125 Ill.2d 572 (1989).

## JURISDICTION

The order of the Illinois Appellate Court, First Judicial District was entered on January 11, 1989. A timely Petition for Leave to Appeal was denied by the Illinois Supreme Court on April 5, 1989. 125 Ill.2d 572 (1989). The Petition for a Writ of Certiorari was submitted on June 5, 1989, and was granted by this Court on October 30, 1989. This Court's jurisdiction is invoked under U.S.C., section 1257(3).

## CONSTITUTIONAL PROVISION AT ISSUE

### Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### A. *Procedural History*

Respondent, Edward Rodriguez, was charged by information in the Circuit Court of Cook County with possession of more than 30 grams of cocaine, in violation of Ill. Rev. Stat. 1983, ch. 56½, sec. 1401(A2). He was also charged with possession of more than 30 grams but less than 500 grams of cannabis in violation of Ill. Rev. Stat. 1983, ch. 56½, sec. 704(D). (Tr. 166-167) Prior to trial, respondent filed a motion to quash arrest and suppress evidence. Respondent alleged that his warrantless arrest was invalid. Specifically, he claimed that the consent to enter the premises where he was arrested was ineffective because the consenter, Gale Fisher, had no authority to permit the entry by police officers. (Tr. 178)



At the hearing on the motion to quash arrest and suppress evidence, which was conducted on August 18, 1986, petitioner asserted that Gale Fisher possessed both the actual as well as the apparent authority to consent to the police entry. Accordingly, petitioner maintained that such entry did not violate respondent's Fourth Amendment rights. The trial court held that Gale lacked actual authority to consent to the police entry. The court also rejected an apparent authority to consent doctrine. Thus, the trial court found that respondent's Fourth Amendment rights had been violated and granted the motion.

Petitioner filed an interlocutory appeal to the Appellate Court of Illinois, which stayed any further proceedings in the trial court. Petitioner again maintained that Gale Fisher not only possessed the actual authority to consent to the police entry but that even if she lacked actual authority to consent, the police officers reasonably relied on her apparent authority to consent to the entry. The Illinois Appellate Court, in an unpublished opinion, held that Illinois cases have interpreted the Fourth Amendment as prohibiting an apparent authority to consent doctrine. The court also held that Gale Fisher lacked sufficient common authority over the premises in question to validate her consent to enter. Petitioner's subsequent Petition for Leave to Appeal these issues to the Illinois Supreme Court was denied.

B. *Facts*

On July 26, 1985, at about 2:30 p.m. Chicago Police Officers James Entress and Ricky Gutierrez received a radio call from another officer instructing them to proceed to a residence at 3554 S. Wolcott in Chicago, Illinois. (J.App. 3-4) The officers were met there by Gale Fisher. Gale told them that earlier in the day respondent, Edward Rodriguez, had beaten her at "their apartment at 3519 S. California." (J.App. 6) Officer Entress noticed that Gale's jaw was swollen, she had a black eye and bruises on her neck. He stated, "She looked like she was the victim of a beating." (J.App. 32) In fact, it was subsequently determined that Gale had sustained a broken jaw. (J.App. 32)

Officer Entress testified that Gale also told them that she wanted to sign a complaint and that all her clothes and furniture were at the apartment on California Avenue. (J.App. 6, 25) She told Officer Entress that she had been living with respondent at that apartment. (J.App. 10, 11, 25) Gale also told the officers that she had her own key and would open the door for them in order to arrest respondent, whom Gale believed was sleeping in the apartment. (J.App. 6)

At the suppression hearing, Officer Entress was asked if he had testified at a preliminary hearing on September 11, 1985 that, "She [Gale] stated she used to live there." (J.App. 10) Officer Entress agreed that he had so testified, but stated at the hearing on the motion to suppress that Gale's exact words were that, "She had been living there." (J.App. 11) Gale kept using the word "our" apartment, when referring to 3519 S. California Avenue. (J.App. 26-27) Officer Entress was never told that



Gale had been living with her mother prior to the beating. (J.App. 11-12)

After the initial conversation with Gale, the officers as well as Gale and her mother, Dorothy Jackson, proceeded to 3519 S. California. Gale walked up to the door, opened the door with a key and allowed the officers to enter the apartment. (J.App. 13) Officer Entress testified that Gale stated it was her key. (J.App. 6, 10, 16, 26) Gale and her mother returned to the police vehicle, while the officers entered the apartment. The officers noticed a bed in the middle of the room. (J.App. 17) There were drug paraphernalia such as scales and pipes that were scattered on the bed. (J.App. 28)

Officer Entress testified that in order to enter the bedroom, they had to walk past some tupperware that was uncovered and in plain view. (J.App. 21) The officer noticed a white powder inside the tupperware that he suspected to be cocaine. (J.App. 28) At that time, the officers did not pick up or handle anything. Instead, they proceeded directly into the bedroom where respondent was sleeping. (J.App. 18-19) As the officers were attempting to awaken respondent, they saw two open briefcases by the side of the bed. (J.App. 19, 21, 29) Inside these attache cases were clear plastic bags containing a white substance that was similar in appearance to the substance they had just seen in the tupperware in the living room. (J.App. 28)

Upon awakening, respondent asked the officers if he could get his money from a dresser drawer in the front room. Respondent opened the drawer and Officer Entress

saw $452.00 and another clear packet containing a white substance. (J.App. 30)

Respondent was transported to the police station where the officers then inventoried the evidence collected at the apartment. This evidence included the controlled substance and cannabis sativa. (J.App. 20, 31) Gale subsequently signed a battery complaint against respondent. (J.App. 31)

Testifying on behalf of petitioner, Dorothy Jackson, Gale's mother, stated that she lived at 3554 S. Wolcott in Chicago. She specifically stated that she lived by herself. (J.App. 35) Ms. Jackson further testified that on July 26, 1985, Gale came to Ms. Jackson's apartment and told Ms. Jackson that respondent had beaten her. (J.App. 45-46) Ms. Jackson noticed that Gale had a black eye and a swollen jaw. (J.App. 46) Ms. Jackson confirmed that when Officers Entress and Gutierrez arrived, Gale told them that respondent had beaten her up. (J.App. 48) Ms. Jackson further testified that in Gale's conversation with the police officers she referred to the apartment at 3519 S. California as "our apartment" and never as "his apartment." (J.App. 52) Ms. Jackson, in her testimony, referred to 3519 S. California as Gale's home. (J.App. 52) Dorothy Jackson also corroborated that Gale opened the door to the apartment at 3519 South California with her own key and allowed the officers to effectuate respondent's arrest. (J.App. 50) Ms. Jackson stated that Gale never told the officers that "she used to live there" or that she did not live at 3519 South California anymore. (J.App. 57)

Dorothy Jackson further testified that on July 1, 1985, Gale brought her children to Ms. Jackson's home and





asked her mother to help move clothes from her apartment at 3519 S. California. They drove to Gale's apartment. Gale opened the door with her key and told her mother to wait so she could get some clothes for the children and herself. She brought two or three baggies, "what ever she could grab real fast." (J.App. 39) Gale left behind all the rest of her personal belongings, including a stove, a refrigerator, a table, chairs, a sofa-bed, the childrens' bed, a dresser, personal bills and china given to Gale by her grandmother. (J.App. 40)

Gale told her mother that she left because respondent wanted the baby to be weaned from her bottle and her other daughter toilet trained. (J.App. 41) After the girls were trained, Gale was to return to her apartment. (J.App. 41) Gale frequently returned to her California Avenue apartment and did not always return to her mother's apartment during the interval of July 1 to July 26. (J.App. 44) When Gale was at her mother's residence, she slept on a coach.

Gale Fisher testified on behalf of respondent. She stated that on July 1, 1985, she moved in with her mother, but prior to that date she lived at 3519 S. California. (J.App. 62-63) She had lived there since December, 1984 with her children. (J.App 68) Gale claimed that when she left she did not have a key to the apartment. (J.App. 64) Between July 1 and July 26 she saw respondent almost every day at the California Avenue apartment and sometimes she spent the night there. (J.App. 73) Gale conceded that she left all her furniture, childrens' furniture and china at the California Avenue apartment. (J.App. 69-70, 72) The only thing that she moved out of the apartment between July 1 and July 26 was clothing. (J.App. 72)

Gale testified that she spoke to police officers on July 26, 1985 at her mother's home and she admitted that she told the officers that she had a key to the apartment on California Avenue and that she would use it to let them enter the premises. (J.App. 77-78) Gale also admitted that she accompanied the officers to the California Avenue apartment and opened the door with the key. (J.App. 78) However, Gale alleged that she took the key from respondent's dresser earlier that day just after respondent beat her. She said respondent had not given her permission to take the key. (J.App. 66) On cross-examination, Gale was asked if she had testified at the preliminary hearing that respondent had given her the key. (J.App. 80) She said she could not remember, but it was stipulated that she in fact had so testified.

Gale testified that subsequent to the July 26th beating, respondent beat her again. This time he hit her in the face with his fist, fracturing her cheekbone in four places. (J.App. 82) Gale admitted fearing respondent at times. (J.App. 82) The court asked Gale why she took the key on July 26th and did not take it on any prior occasion. Gale claimed that during the argument, the doors to the California Avenue apartment were locked and a key was needed to open the door from the inside. (Tr. 99) However, on redirect examination, Gale admitted that on the date of the July 26th argument, respondent had actually let her out of the apartment, but she wanted the key in case "he ever did that again." (Tr. 100)

Examination by the trial judge also elicited the following testimony from Gale: her name was not on the lease for the apartment, she did not contribute to rent payments in June or July (Tr. 100-101) – although she did



use her check to pay for their bills and groceries – she never invited friends to the apartment and she never went to respondent's home when he was not there. (Tr. 102)

The trial court held that Gale did not have the actual authority to consent to the police officers' entry of the apartment on California Avenue. The court based its decision on its finding that Gale's name was not on the lease, she did not contribute to the rent, it was not her exclusive or usual place of residence, she did not have access when respondent was not there, she never brought people there and she moved her clothes and children to her mother's home. The Illinois Appellate Court agreed and noted further that Illinois cases had interpreted the Fourth Amendment as prohibiting an apparent authority to consent doctrine.

## SUMMARY OF ARGUMENT

The Fourth Amendment only prohibits unreasonable searches and seizures. It is well-established that a search based on the valid consent of a third party is not unreasonable and, therefore, does not violate a defendants' Fourth Amendment rights. *United States v. Matlock*, 415 U.S. 164 (1974). When police officers, in good faith, reasonably rely on objective facts and circumstances which indicate that a third party possesses sufficient authority over the premises to give valid consent to enter, the ensuing entry is not unreasonable and no warrant should be required by the Fourth Amendment. The propriety of

this doctrine, which has been termed apparent authority to consent, was specifically left open in *Matlock*.

The entry of 3519 South California by police officers in the case at bar was proper under the Fourth Amendment because the objective facts presented to the officers supported their reasonable belief that Gale Fisher possessed actual authority to consent. The officers knew that Gale had been beaten by respondent at 3519 South California which Gale referred to as "our" apartment. Gale told them that all of her possessions were at that apartment and that she had a key to allow them entry. Gale said it was "her" key and she opened the door for the officers in order to effectuate the arrest of respondent. Moreover, all of their information was corroborated by an independent witness, Dorothy Jackson, Gale's mother. Based on these facts, any reasonable police officer would have concluded that Gale had the necessary authority to consent to the entry of the premises.

Alternatively, even if this Court were to hold that the Fourth Amendment does not provide for the apparent authority to consent doctrine and that the warrant requirement is not excused, exclusion of the evidence is an inappropriate remedy. Where, as here, police officers, in good faith, reasonably rely on objective facts and circumstances, which indicate that a third party has the authority to consent to an entry, the good faith exception to the exclusionary rule should be applied. *United States v. Leon*, 468 U.S. 897 (1984). Since there was no misconduct on the part of the police officers in this case, exclusion would only serve to discourage police officers from conducting valid consensual searches.



Petitioner also contends that the Illinois Appellate Court misapplied *Matlock* to the facts of the instant case when it held that Gale Fisher did not possess common authority to consent to the police entry. At the time of the entry, Gale was living with her mother on a temporary basis. The fact that all of her possessions including appliances, furniture and personal effects, such as her grandmother's china, remained at 3519 South California strongly support the conclusion that Gale had not abandoned the premises but rather had mutual use and joint control for most purposes. This conclusion is further supported by her possession of the key. In short, the Illinois Appellate Court misapplied *Matlock* by relying on property concepts in determining the existence of common authority.

## ARGUMENT

### I.

### THE ILLINOIS APPELLATE COURT HAS MISINTERPRETED THE FOURTH AMENDMENT BY REFUSING TO RECOGNIZE A VALID EXCEPTION TO THE WARRANT REQUIREMENT WHEN A POLICE OFFICER, IN GOOD FAITH, RELIES ON A THIRD PARTY'S APPARENT AUTHORITY TO PERMIT A CONSENSUAL ENTRY. IN THE ALTERNATIVE, THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD APPLY IF THE WARRANT REQUIREMENT IS NOT EXCUSED.

### A.

### Since Reasonableness Is The Touchstone Of The Fourth Amendment, The Warrant Requirement Should Be Excused Where The Objective Facts And Circumstances Indicate That Police Officers Have Reasonably Relied On A Third Party's Apparent Authority To Consent to An Entry.

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court held that consent is a valid exception to the Fourth Amendment warrant requirement. In *United States v. Matlock*, 415 U.S. 164 (1974), this court further held that consent may be obtained from a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected. 415 U.S. at 171. The case at bar presents the question explicitly left open in *Matlock*, that being whether the police officers reasonably believed that a third party had sufficient authority over the premises to render valid consent. 415 U.S. 164, 177 n.14. If a police officer reasonably relies on objective facts and circumstances which indicate that a



third party possesses a sufficient relationship to the premises to give valid consent to enter, the Fourth Amendment warrant requirement should be excused.

The overwhelming majority of both state and federal courts that have reached the issue have fully embraced this proposition which has come to be known as the apparent authority to consent doctrine.[1] Properly

---

[1] *Nix v. State*, 621 P.2d 1347 (Alaska, 1981); *State v. McGann*, 132 Ariz. 296, 645 P.2d 811 (1982); *Spears v. State*, 270 Ark. 331, 605 S.W.2d 9 (1980); *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955); *People v. Jacobs*, 43 Cal. 3d 472, 233 Cal. Rptr. 323, 729 P.2d 757 (1987) (en banc); *People v. Berow*, 688 P.2d 1123 (Colo. 1984); *Jackson v. United States*, 404 A.2d 911 (D.C. App. 1979); *Flanagan v. State*, 440 So. 2d 13 (Fla. App. 1983); *Commonwealth v. Wahlstrom*, 375 Mass. 115, 375 N.E.2d 706 (1978); *People v. Gary*, 150 Mich. App. 446, 387 N.W.2d 877 (1986); *People v. Wagner*, 114 Mich. App. 541, 320 N.W.2d 251 (1982); *Snyder v. State*, 738 P.2d 1303 (Nev. 1987); *State v. Miller*, 159 N.J.Super. 552, 388 A.2d 993 (1978); *People v. Adams*, 53 N.Y.2d 1 (1981); *State v. Bailey*, 276 S.C. 32, 274 S.E.2d 913 (1981); *State v. No Heart*, 353 N.W.2d 43 (S.D. 1984); *State v. Elphee*, 1989 Tenn. Crim. App. Lexis 163 (March 7, 1989); *McNairy v. State*, 777 S.W.2d 570 (Tex. App. Austin, 1989); *State v. Christian*, 613 P.2d 1199 (1980), aff'd., 95 Wash, 2d 655, 628 P.2d 806 (1981). In addition, Federal Circuit Courts of Appeals have also adopted this doctrine. They include *United States v. DiPrima*, 472 F.2d 550 (1st Cir. 1973); *United States v. Isom*, 588 F.2d 858 (2d Cir. 1978); *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975); *United States v. Rodriguez*, Slip op. No. 88-2952 (7th Cir., November 1, 1989); *United States v. Sells*, 496 F.2d 912 (7th Cir. 1974); *United States v. Hamilton*, 792 F.2d 837 (9th Cir. 1986); *United States v. Sledge*, 650 F.2d 1075 (9th Cir. 1981). Compare: *State v. Logan*, 617 S.W.2d 433 (Mo. App. 1981). Contra: *State v. Carsey*, 295 Or. 32, 664 P.2d 1085 (1983); *State v. Matsen*, Ohio Court of Appeals, Slip op. (September 29, 1989) (1989 Ohio App. Lexis 3723).

interpreted, the Fourth Amendment would excuse the warrant requirement when police officers rely on a third party's apparent authority to consent to an entry. The test for apparent authority should be whether the police, acting in good faith, reasonably believe that the third party possesses the requisite authority to consent. This test ignores the subjective beliefs of the officers, and looks to objective facts which the officers relied upon in concluding that the third party possessed sufficient authority to consent.[2]

The facts of this case clearly support a determination that Officers Entress and Gutierrez reasonably believed that Gale Fisher possessed the requisite authority to consent to their entry at 3519 South California Avenue in order to arrest respondent, Edward Rodriguez. The officers were called to the house of Dorothy Jackson, Ms. Fisher's mother. At the suppression hearing, Officer Entress testified that Gale Fisher told him the following:

> She stated Edward Rodriguez earlier in the day had beaten her at their apartment at 3519 S. California. She stated that she wanted to sign complaints. That all her clothes and her furniture were in that apartment and that she had her own key for the apartment. That she would open the door and allow us to go into arrest Eddie Rodriguez who was at the apartment at the time and she felt he was sleeping. (J.App. 6)

[2] In using the term good faith in this section, petitioner is not referring to the good-faith exception to the exclusionary rule that was announced in *United States v. Leon*, 468 U.S.897 (1984). Petitioner's main contention is that since the Fourth Amendment provides for apparent authority to consent, respondent's Fourth Amendment rights have not been violated and thus, the exclusionary rule is inapplicable. The issue of whether the good faith exception to the exclusionary rule should be applied if the Fourth Amendment does not provide for apparent authority is discussed in Section B.



Dorothy Jackson confirmed that, in fact, her daughter had referred to the apartment at 3519 South California as "her home" as well as "our apartment" when talking to the police officers. (J.App. 52) Officer Entress testified that Gale Fisher repeatedly used the word "our" when referring to the apartment at 3519 South California. (J.App. 26)

After deciding that she indeed wanted to press charges against respondent, Gale, Dorothy Jackson and the police officers proceeded to 3519 South California. Gale took out her key, opened the door to the apartment and allowed the officers to enter. According to Officer Entress, Gale stated that this was her key. (J.App. 6, 9, 16, 26)

The police officers were thus faced with a woman who had been severely beaten; Gale Fisher had a swollen jaw, a black eye and bruises on her neck. (J.App. 32) Gale told the officers that her live-in boyfriend was responsible and volunteered to take the officers to what she termed "our" apartment. Moreover, she told the officers that all her clothes and furniture were at the apartment at 3519 South California. Upon arriving at the residence, Gale produced a key which she referred to as hers, and allowed the officers to enter to effectuate the arrest. The beating in fact took place at that same apartment.

Based on these objective facts and circumstances, any reasonable police officer would have concluded that Gale Fisher possessed the actual authority to permit the entry. This is especially true where all of this information was

corroborated by an independent witness, Dorothy Jackson. Moreover, the officers had no reason to question Gale's possession of the key. The officers were not told that Gale had also been staying at her mother's apartment prior to the beating.

In interpreting the Fourth Amendment, this Court has long held that its guiding determination is reasonableness. Indeed, it is the touchstone of the Fourth Amendment that only unreasonable searches and seizures are to be prohibited. In analogous circumstances, this Court has ruled that a search based on a good faith mistake of fact is not unreasonable. *Hill v. California*, 401 U.S. 797 (1971); *Maryland v. Garrison*, 480 U.S. 79 (1987).

In *Hill*, this Court was faced with a situation where police officers possessed probable cause to arrest the defendant. When the officers arrived at defendant Hill's residence, they arrested a person whom they believed to be defendant, but who later turned out to be defendant's accomplice, Miller. Incident to this arrest, a subsequent search of Hill's residence turned up evidence that formed the basis for defendant's armed robbery conviction. In upholding the denial of defendant's motion to suppress, this Court stated:

> The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the



> arrest a reasonable response to the situation facing them at the time.

461 U.S. at 805-806.

Thus, in *Hill*, notwithstanding the officers' mistake, the Court upheld the application of the search incident to arrest exception to the warrant requirement due to the reasonableness of their conduct. Moreover, in *Maryland v. Garrison, supra*, this Court held that the underlying rationale in *Hill* was "equally applicable to an officer's reasonable failure to appreciate that a valid warrant describes too broadly the premises to be searched." 480 U.S. at 88. Likewise, an arrest based on an officer's reasonable determination that a third party possessed the requisite authority to permit a consensual entry should not be proscribed by the Fourth Amendment if it is subsequently determined that the third party, in fact, lacked sufficient authority to consent.

This interpretation is also consistent with the analogous line of cases that have determined the standard for assessing probable cause to arrest under the Fourth Amendment. For instance, in *Brinegar v. United States*, 338 U.S. 160 (1949), the Court stated:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts

> leading sensibly to their conclusions of probability.

330 U.S. at 176.[3]

As noted previously, the vast majority of courts that has addressed this issue has adopted the apparent authority to consent doctrine. *See* n.1, *supra*. Most recently, in *United States, v. Miguel Rodriguez*, No. 88-2952 (7th Cir., November 1, 1989), (no relation to the case at bar) the United States Court of Appeals for the Seventh Circuit noted that the question posed by the Fourth Amendment is whether a search is reasonable and held further that it is reasonable for police officers to act on the basis of apparently valid consent. In *Rodriguez*, defendant's wife consented to an entry of defendant's quarters. Defendant was a janitor at a union hall, who shared an upstairs room with his wife. Prior to his arrest, defendant separated from his wife, moved out of the upstairs room and began residing in the janitors' quarters, which he shared with another janitor. Subsequent to defendant's arrest, Ms. Rodriguez used her key to permit the agents to enter the janitors' quarters.

In upholding the legality of the consent to entry, the Seventh Circuit specifically held that a reasonable

---

[3] In *Brinegar*, the Court further stated that:

> In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.

338 U.S. 160, 175 (1949). *See also Illinois v. Gates*, 462 U.S. 213 (1983).



interpretation of the Fourth Amendment would provide for an apparent authority doctrine. The Court stated:

> Mrs. Rodriguez's possession of the key gave her apparent authority to consent. Apparent authority is enough. Just as police may have probable cause to act even though their source was lying, so they may act when the person giving consent has apparent authority. *United States v. Miller*, 800 F.2d 129, 133 (7th Cir. 1986); *United States v. Sledge*, 650 F.2d 1075, 1077-81 (9th Cir. 1981) (Kennedy, J.); *United States v. Isom*, 588 F.2d 858, 861 (2d Cir. 1978); *United States v. Peterson*, 524 F.2d 167, 180 (4th Cir. 1975); cf. *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (reserving the question). The question posed by the Fourth Amendment is whether the search is "reasonable", and it is reasonable to act on the basis of apparently valid consent.

Slip op. 6.

In *Rodriguez*, the Seventh Circuit Court of Appeals also expressed concern over the dangers engendered by an interpretation of the Fourth Amendment which would not provide for recognition of an apparent authority doctrine. The Court observed:

> Going beneath the surface of the information at hand – whether furnished by an eyewitness, see *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 437-41 (7th Cir. 1986), or by a person giving consent – would make the outcome of the search depend on the niceties of property or marital law far removed from the concerns of the Fourth Amendment. Consents would become untrustworthy unless the police spent additional time investigating the authority of the person who gave consent, which in a case

> like ours would require knowledge of Illinois domestic relations law and the living arrangements of the couple.

Slip op. at 6.

Police officers should not be required to be legal technicians, but rather, reasonably prudent men and women. They must make on-the-spot judgments in a myriad of difficult situations. *Brinegar, supra,* 338 U.S. at 175. Police officers do not have legal documents such as leases, warranty deeds or affidavits of title at their disposal. They can only be expected to deal with what is apparent to them at the time consent is given. *See Hill, supra,* 401 U.S. at 803-804; *Garrison, supra,* 480 U.S. at 88.

A determination to the contrary would render this Court's decision in *Schneckloth v. Bustamonte, supra,* 412 U.S. 218, a hollow one.[4] A decision rejecting an apparent authority to consent doctrine would not deter police misconduct because there is no wrongdoing when police officers reasonably rely on the objective facts and circumstances available to them. However, rejection of the doctrine could serve to deter the use of consensual searches which are a "wholly legitimate aspect of effective police activity." *Id.* at 228. As the Seventh Circuit stated in *United States v. Miguel Rodriguez, supra,* "Denying police the ability to act on the basis of apparent authority would not deter improper conduct; it would instead deter acting on the basis of consents. *Nix of Alaska,* 621 P.2d 1347, 1349-50 (Alaska, 1981)." *See* slip op. at 6.

---

[4] "In short, a search pursuant to consent . . . properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity." 412 U.S. at 228.



The adoption of the apparent authority to consent doctrine is also necessary to conform Fourth Amendment analysis to the significant sociological and cultural changes that have occurred in the fifteen years since this Court issued its decision in *Matlock.* Today, it has become quite common for individuals to enter into fluid, non-marital living arrangements.[5] As such, actual authority can be an extremely elusive concept and one quite unsuited to the exigencies of the various situations now faced by our nation's law enforcement officers on a daily basis.[6]

In sum, whenever a police officer reasonably and in good faith relies on objective facts and circumstances which indicate that a third party possesses a sufficient

---

[5] See also, Wayne R. LaFave, *Search and Seizure,* A Treatise On The Fourth Amendment, 2nd ed., vol. 3, 1987, page 260, wherein it is suggested that in *Frazier v. Cupp,* 394 U.S. 731 (1969), there is at least a hint that the valued practice of allowing searches by consent ought not be subjected to unrealistic restraints based upon subtle distinctions in individual living arrangements.

[6] This is not to suggest that a determination by a court of law that actual authority to consent existed should be abandoned. As in *Matlock,* if it is determined that actual authority to consent was in fact present, then there would be no need to analyze whether or not the police officers reasonably relied on the objective facts and circumstances presented to them. Only when a court of law finds actual authority to consent lacking will the determination of the police officers' actions be scrutinized under the apparent authority doctrine. (See Argument II, *infra,* p. 26)

relationship to the premises to give valid consent to enter, the Fourth Amendment warrant requirement should be excused. It was certainly reasonable for Officers Entress and Gutierrez to believe that Gale Fisher in fact possessed the requisite actual authority to consent to their entry. She referred to the premises as our apartment and referred to the key which she used to allow the officers' entry as her key. Gale Fisher quite clearly was the victim of a severe beating which she claimed was administered by respondent at the California Avenue apartment. Where, as here, the police officers' conduct is objectively reasonable, the Fourth Amendment warrant requirement should be excused. As such, the ruling of the Illinois Appellate Court should be reversed.

B.

**If This Court Does Not Recognize Apparent Authority As An Exception To The Warrant Requirement, The Good Faith Exception To The Exclusionary Rule Should Be Applied.**

Assuming that this Court holds that the Fourth Amendment warrant requirement is not excused where police officers reasonably rely on a third party's apparent authority to consent to an entry, the good faith exception to the exclusionary rule should be applied.

In *United States v. Leon*, 468 U.S. 897 (1984), this Court held that the exclusionary rule would not bar the use of evidence in the prosecution's case in chief where the evidence was obtained by officers acting in reasonable reliance on a search warrant issued by a detached and



neutral magistrate, but ultimately found to be unsupported by probable cause. In so holding, this Court recognized that the exclusionary rule operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

Indisputably, the central purpose of the exclusionary rule is the deterrence of police misconduct. In *Leon*, the Court's decision was grounded in its finding that the exclusionary rule could not have any deterrent effect when the offending officers acted in an objectively reasonable manner in obtaining and executing the warrant.

The underlying rationale of *Leon* applies with equal force to the case at bar. Here, the officers in good faith possessed an objective good faith belief that Gale Fisher had common authority over the premises at 3519 South California. Gale Fisher specifically used the word "our" when referring to the premises and her mother referred to it as "her home," i.e., Gale's home. (J.App. 52) In addition, Gale told the officers that her furniture and her clothes were at the apartment. Further, Gale allowed the officers to enter through the front door with what she called "her" key. (J.App. 27) The officers believed they had secured the necessary consent to enter the residence without a warrant and that belief was objectively reasonable.

Just as in *Leon*, the purpose of the exclusionary rule would not be served by suppressing the evidence in this case. When police officers reasonably believe that they

are acting in accord with the Fourth Amendment, there can be no deterrent effect. As this Court observed in *United States v. Peltier*, 422 U.S. 531, 539 (1975), which was cited with approval in *Leon*:

> 'If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. See also *Illinois v. Gates*, 462 U.S. at 260-61, 103 S.Ct. at 2344 (White, J., concurring in judgment); *United States v. Janis, supra*, 428 U.S. at 459, 96 S.Ct. at 3034: *Brown v. Illinois*, 422 U.S. at 610-11, 95 S.Ct. at 2265-66 (Powell J., concurring in part). In short, where the officer's conduct is *objectively reasonable*, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way effect his future conduct unless it is to make him less willing to do his duty. *Stone v. Powell*, 428 U.S. at 539-40, 96 S.Ct. at 3073-74 (White, J., dissenting).' *United States v. Leon*, 468 U.S. 897 at 921. (emphasis added)

Furthermore, in *Illinois v. Krull*, 480 U.S. 340 (1987), this Court held that where police officers reasonably rely on a state statute that is later determined to be unconstitutional, evidence seized during a search made pursuant to such statute should not be subjected to the strictures of the exclusionary rule. In so holding, *Krull* recognized that police officers need only act reasonably under the Fourth Amendment, and reasonableness is to



be measured by the objective facts and circumstances presented at the time of the search. See also *People v. Adams*, 53 N.Y.2d 1, 439 N.Y.S.2d 877, 422 N.E.2d 537 (1981), wherein the New York Court of Appeals specifically recognized that where a police officer reasonably relied on a third party's apparent authority to consent, the exclusionary rule should not apply. Just as in *Leon*, the Court in *Krull* refused to punish reasonable law enforcement activity with the extreme sanction of exclusion. Similarly, application of the exclusionary rule in the case at bar would be equally inappropriate and unwarranted.

Here, the police officers acted in reasonable, good faith, reliance on Gale Fisher's apparent authority to permit their entry. They entered the apartment because they reasonably believed that Gale Fisher possessed common authority. In the future, police officers, faced with similar circumstances will make the same decision when they reasonably believe they have secured valid consent. The only tangible effect of a failure to adopt the apparent authority to consent doctrine will be to deter consensual searches and thereby impair legitimate police activity. It is for this reason that neither the purpose of the exclusionary rule nor the interests of justice would be served by excluding the evidence in this case.

## II.

## WHERE GALE FISHER REFERRED TO THE APARTMENT AT 3519 SOUTH CALIFORNIA AVENUE AS HER APARTMENT, RETAINED POSSESSION OF A KEY TO SUCH APARTMENT WHICH SHE TERMED HER KEY, AND KEPT ALL HER POSSESSIONS EXCEPT THREE BAGS OF CLOTHING AT THE APARTMENT, THE ILLINOIS APPELLATE COURT MISINTERPRETED *UNITED STATES V. MATLOCK* BY FINDING THAT GALE LACKED COMMON AUTHORITY TO PERMIT A CONSENSUAL ENTRY.

In reaching the conclusion that Gale Fisher lacked the authority to consent to the police entry of 3519 South California on July 26, 1985, the Illinois Appellate Court misapplied this Court's holding in *United States v. Matlock*, 415 U.S. 164 (1974). In *Matlock*, this Court held that the consent which is necessary to justify a warrantless search may be obtained from a third party who possesses common authority over the premises sought to be inspected. In explaining the concept of a third party's common authority, the *Matlock* court stated:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property . . . but rests rather on mutual use of the property by persons generally having joint control for most purposes, so that it is reasonable to recognize that any of the cohabitants had the right to permit the inspection in his own right and that the others have assumed the risk that one of their member might permit the common area to be searched. *Id.* 415 U.S. 172, n.7.

In light of this Court's pronouncement of common authority in *Matlock*, the facts in the case at bar support a



determination that Gale Fisher possessed a sufficient relationship to the premises to give valid consent to enter to the police officers. Gale and her two children lived with respondent at 3519 South California from December of 1984 until July of 1985. During that period, Gale testified that her stove, refrigerator, sofa-bed, table and chairs were at the apartment along with a dresser and beds which were used by her children. Gale indicated that her grandmother's china was kept at the apartment as well. The fact that these possessions were used at the apartment at 3519 South California was corroborated by Gale's mother, Dorothy Jackson.

Gale admitted that she had an argument with respondent, had fought with him on other occasions and that respondent would slap her. Gale stated that on July 1, 1985, she took clothing for herself and her children and moved out of the apartment at 3519 South California and in with her mother at 3554 South Wolcott. However, Gale admitted that besides some clothing, everything else that she owned remained at the apartment at 3519 South California. (J.App. 72)

Between July 1, 1985 and July 26, 1985, Gale testified that she returned to the apartment at 3519 South California almost every day to see respondent. (J. App. 73) Gale also admitted that sometimes she would be there late into the night and had probably slept there on occasion. Dorothy Jackson substantiated this by testifying that during this period, Gale did not come back to Ms. Jackson's apartment until 3:00 a.m. on at least three to five occasions. (J.App. 55)

At the hearing on the motion to quash arrest and suppress evidence, Gale testified that she left her key at the apartment on California on July 1, 1985 when she moved in with her mother, (J.App. 64) and when respondent beat her up on July 26, 1985, she took the key from the dresser without his knowledge or permission. However, at the preliminary hearing held on September 11, 1985, Gale testified that respondent had given her the key to the apartment. (J.App. 80) It is noteworthy that Gale admitted that subsequent to the beating and respondent's arrest on July 26, 1985, respondent came through her friend's window, used his fist to hit her in the face with such force that Gale's cheekbone was fractured in four places. (J.App. 82) Gale also admitted that she was afraid of respondent when he gets mad. (J.App. 84)

When these facts are analyzed in light of this Court's decision in *Matlock*, it is clear that Gale possessed common authority over the apartment at 3519 S. California. From December of 1984 to June 30, 1985, Gale unquestionably possessed common authority. By moving out temporarily, Gale did not lose her common authority over the apartment. Gale did not abandon the premises. Gale admitted that every worldly possession besides some clothing, remained at the apartment. Indeed, Gale was at the apartment almost every day between July 1 and July 26. Dorothy Jackson's testimony corroborates this point. In describing the July 1 move, Dorothy testified that Gale told her that the purpose of returning to her mother's home was to toilet train one child and wean the other from her bottle because respondent was annoyed with their lack of training. After the girls were trained, Gale was to return to her apartment. (J.App. 41) When Gale



moved into her mother's home, she just took some clothing, "whatever she could grab real fast." (J.App. 39) This was hardly a permanent move, nor had Gale abandoned her interest in the premises on California Avenue. Gale's stay at her mother's home was intended to be temporary, a fact supported by Gale's frequent visits to "her" apartment. Gale's use of the key to enter the apartment on July 1, 1985 and July 26, 1985 further evidences not only Gale's mutual use, but her control over the premises. The story about how Gale came to possess that key differed substantially from her previous court reported testimony.

It is clear that Gale possessed a sufficient relationship to the premises to give valid consent to enter to the police officers. It is only through a misapplication of *Matlock* that the Illinois Appellate Court and the trial court were able to reach a contrary conclusion. Indeed, the Illinois Appellate Court was guided by the precise property concepts of which the *Matlock* court expressed its disapproval. In finding that Gale Fisher lacked a sufficient relationship to the premises and thus lacked actual authority to give valid consent, the Illinois Appellate Court relied on these specific factors:

> (1) Gale's name was not on the lease and she did not contribute to the rent;
>
> (2) 3519 South California was not her exclusive or even her usual place of residence, rather, she was an infrequent visitor, guest or invitee;
>
> (3) She did not have access to the apartment when respondent was not there and, like a guest, she only had access to the apartment when respondent was present;

(4) She never brought people over to the apartment;

(5) She moved her clothes, and more importantly, her children to her mother's residence.

In relying on these factors the Illinois Appellate Court not only violated both the spirit and intent of this Court's decision in *Matlock*, but ignored its precise dictates. First, the fact that Ms. Fisher's name did not appear on the lease and that she did not contribute to the rent are the precise type of property concepts that this Court condemned in *Matlock*. Many people do not contribute monetarily to rent payments, nor have their name on the lease. Nevertheless, they would be quite alarmed and appalled to discover that they cannot give valid consent to enter their places of residence.

Second, the facts of this case also show that 3519 South California was Gale's permanent residence. Gale moved to her mother's home on a temporary basis taking with her whatever she could carry. The fact that all her possessions remained at 3519 S. California is strong evidence that this was still her permanent residence. Technically, when Gale moved in with her mother, 3519 S. California was no longer her "exclusive residence." However, many people have more than one residence. For example, it is common for people to own summer homes or maintain a permanent residence in the suburbs and an apartment in the city. Furthermore, the evidence belies the finding that Gale was an infrequent visitor. She admittedly went to 3519 South California almost every day during the period between July 1 and July 26 and even spent the night.



Third, contrary to the conclusion of the Illinois Appellate Court, Gale probably did have access to the apartment when respondent was not there. Indeed when she moved her clothes out of the apartment, she entered with a key. She also used her key on July 26, 1985, which she had initially testified at the preliminary hearing respondent had given her. On both of these occasions, these entries were witnessed by Dorothy Jackson.

Fourth, the fact that Gale never brought friends to the apartment is not dispositive. There was no testimony that she was prohibited from doing so.

Finally, Gale moved her children and three baggies of clothing for what was supposed to be a short period of time. The move was not intended to be permanent.

In *State v. Madrid*, 91 N.M. 375, 574 P.2d 594 (1978), the New Mexico Court of Appeals was faced with facts similar to those of the instant case. In *Madrid*, the Court of Appeals, in reliance on *Matlock*, found that defendant's wife possessed common authority over the premises and reversed the suppression order that had been entered by the trial court.

Defendant, Eugene Madrid, and his wife were married in 1972, moved into the Morgan Street residence in 1974 and lived there together until November, 1976. When marital difficulties arose, Mrs. Madrid moved out of the residence in question and moved in with her mother. As in the case at bar, Mrs. Madrid took most of her clothing with her, but left property in which she possessed a legitimate interest, including a television set,

automobile and bedroom furniture. She also left a bedroom set that she owned herself and a box of "unidentified things" that belonged to her daughter. In addition, defendant paid the rent and all bills at the residence. Finally, both defendant and his wife possessed keys to the residence.

In *Madrid*, defendant's wife consented to an entry and search of defendant's residence. Defendant's wife met the officers at the residence, unlocked the back door with a key and told the officers that they could go inside and look around. *Id.* at 595. Just as in the case at bar, the question of the validity of Mrs. Madrid's consent arose due to the fact that she was not living at the residence at the time she gave consent.

On the basis of these facts, the *Madrid* court found that Mrs. Madrid possessed common authority under *Matlock*, and thus gave valid consent. Unlike the Illinois Appellate Court, the *Madrid* court was faithful to this Court's directives not to rely on property concepts when assessing third party consent. Indeed the court stated: "The question of . . . 'common authority' is not to be determined on the wife's property interest in the premises." *Id.* at 596. Thus, the court recognized that under *Matlock*, a third party may validly consent if he or she possesses common authority or other sufficient relationship to the premises. *Id.* at 597.

The *Madrid* court found that Mrs. Madrid possessed a sufficient relationship to the premises. Unlike the Illinois Appellate Court, the *Madrid* court found that the wife's possession of the key justified an inference of unrestricted access. *Id.* at 597. The court also focused on the



fact that Mrs. Madrid left property on the premises in which she had a legitimate interest. Mrs. Madrid had moved out of the residence over five months prior to the search. In the case at bar, Gale had left for only twenty-five days, had spent substantial amounts of time at 3519 South California and in fact spent the night there on several occasions.

In *Sullivan v. State*, 716 P.2d 684 (Okl. App. 1986), the Oklahoma Court of Criminal Appeals reached a similar conclusion when confronted with analogous facts. In *Sullivan*, defendant Sullivan and his common-law wife, Ruth Leber, shared a rental house together until April 7, 1983. On that date, due to marital problems, Leber moved most of her belongings and those of her children out of the house and into her mother's home. However, Leber did leave some things at the residence that she planned to pick up at a later time. Moreover, she retained a key to the residence that she used to allow the officers to enter on the following day.

Defendant was subsequently arrested following an altercation with his common-law wife. The following day, Leber met the officers at the residence, produced a key and allowed the officers access to the house. Again, just as in *Madrid*, defendant's wife was not living at the residence at the time she gave consent.

Based on these facts, the *Sullivan* court held that Leber possessed common authority under *Matlock*. The court emphasized that Leber had retained a key to the residence and continued to exercise common authority.

The court stated that Leber's common authority was evidenced by her intent to return later, at her leisure, and remove her remaining property.

The facts which evidenced Gale Fisher's actual authority are equally compelling.[7] The Illinois Appellate Court erred in concluding that Gale Fisher could not give valid consent under *Matlock*, and in relying on property concepts in determining whether common authority existed. Accordingly, the Illinois Appellate Court's decision should be reversed.

---

[7] See: *United States v. Crouthers*, 669 F.2d 635 (10th Cir. 1982); *United States v. Long*, 524 F.2d 660 (9th Cir. 1975); *United States v. Lawless*, 465 F.2d 422 (4th Cir. 1972).



## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Honorable Court reverse the judgment of the Illinois Appellate Court and remand the case to the Circuit Court of Cook County for further proceedings.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois
ROBERT J. RUIZ,
Solicitor General
State of Illinois
TERENCE M. MADSEN,*
Assistant Attorney General
100 West Randolph Street,
Suite 1200
Chicago, Illinois 60601

*Attorneys for Petitioner.*

**Counsel of Record.*

CECIL A. PARTEE,
State's Attorney
County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
RENÉE GOLDFARB,
PAUL GLIATTA,
Assistant State's Attorneys
*Of Counsel.*

No. 88-2018

In The

# Supreme Court of the United States

October Term 1989

STATE OF ILLINOIS,

*Petitioner,*

vs.

EDWARD RODRIGUEZ,

*Respondent.*

**On Writ Of Certiorari To The Appellate Court Of Illinois, First District**

## BRIEF FOR THE RESPONDENT

JAMES W. REILLEY*
Attorney at Law
2720 River Road, Suite 134
DesPlaines, Illinois 60018
(708) 299-8870
*Counsel of Record

CHRISTINE P. CURRAN
DIANNE RUTHMAN
Attorneys at Law
2720 River Road, Suite 134
DesPlaines, Illinois 60018
(708) 299-8870
*Attorneys for Respondent*

THOMAS Y. DAVIES
Attorney at Law
1505 W. Cumberland Avenue
Knoxville, Tennessee 37996-1800
(615) 974-6819

RICK HALPRIN
Attorney at Law
205 W. Randolph Street
Chicago, Illinois 60606
(312) 419-9898

Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

# INDEX

INDEX – Continued





TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued



CONSTITUTIONAL PROVISIONS AND STATUTES:





TABLE OF AUTHORITIES – Continued



MISCELLANEOUS:

No. 88-2018

In The

# Supreme Court of the United States

October Term 1989

STATE OF ILLINOIS,

*Petitioner,*

vs.

EDWARD RODRIGUEZ,

*Respondent.*

**On Writ Of Certiorari To The Appellate Court Of Illinois, First District**

## BRIEF FOR THE RESPONDENT

## CONSTITUTIONAL PROVISIONS

United States Constitution amendment IV.;

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I § 6 of the 1970 Illinois Constitution:

Searches, Seizures, Privacy and Interceptions

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

## STATUTES

Ch. 38, Illinois Revised Statutes, § 107-11 (1987):

107-11. When summons may be issued

§ 107-11. When summons may be issued. (a) When authorized to issue a warrant of arrest a court may in lieu thereof issue a summons.

(b) The summons shall:

(1) Be in writing;

(2) State the name of the person summoned and his address, if known;

(3) Set forth the nature of the offense;

(4) State the date when issued and the municipality or county where issued;

(5) By signed by the judge of the court with the title of his office; and

(6) Command the person to appear before a court at a certain time and place.



(c) The summons may be served in the same manner as the summons in a civil action, except that police officers may serve summons for violations of ordinances governing the parking or standing of vehicles occurring within their municipalities.

Ch. 38, Illinois Revised Statutes, § 107-12 (1984):

107-12. Notice to appear

§ 107-12. Notice to appear. (a) Whenever a peace officer is authorized to arrest a person without a warrant he may instead issue to such person a notice to appear.

(b) The notice shall:

(1) Be in writing;

(2) State the name of the person and his address, if known;

(3) Set forth the nature of the offense;

(4) Be signed by the officer issuing the notice; and

(5) Request the person to appear before a court at a certain time and place.

(c) Upon failure of the person to appear a summons or warrant of arrest may issue.

(d) In any case in which a person is arrested for a Class C misdemeanor or a petty offense and remanded to the sheriff other than pursuant to a court order, the sheriff may issue such person a notice to appear.

Ch. 38, Illinois Revised Statutes, § 107-2(c) (1982):

107-2. Arrest by peace officer

§ 107-2. (1) Arrest by Peace Officer. A peace officer may arrest a person when:

• • •

(c) He has reasonable grounds to believe that the person is committing or has committed an offense.

## STATEMENT OF THE FACTS[1]

On July 26, 1985, the Chicago police were summoned to 3554 S. Wolcott, Chicago, Illinois, by Dorothy Jackson, the mother of Gail Fischer. (J.A.47) Dorothy Jackson, a Cook County Deputy Sheriff, called the police when her daughter told her that Ed Rodriguez had beaten her. (J.A.35,46) When Officer Tenza arrived and spoke to Gail Fischer, their original investigation centered around a battery victim, namely Gail Fischer, and the possible suspect being a boyfriend (not a husband), the respondent Edward Rodriguez. (Supplemental Record [hereinafter referred to as (S.R.)] 4) Subsequently, tactical officers Entress and Gutierrez arrived at Jackson's and Fischer's

[1] Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, respondent will file a Supplemental Statement of the Facts in order to correct inaccuracies and omissions in the Statement filed by the Petitioner.



apartment at approximately 2:30 p.m. There, they met with Officer Tenza. During the conversation with Gail Fischer they learned that the alleged battery had occurred earlier in the day. (S.R.13-14) Officer Tenza's police report indicated that the time of day of the battery occurrence was approximately 11:00 a.m. (J.A.8)

At the preliminary hearing, on September 11, 1985 (approximately six weeks after the defendant's arrest), Officer Entress testified that when he asked Gail Fischer if she lived with the defendant at 3510 South California, she responded:

*SHE STATED SHE USED TO LIVE THERE.*

(S.R.16) (emphasis added) At the hearing on the motion to suppress evidence, which occurred on August 18, 1986 (over one year after the incident), Officer Entress testified that when asked the same question Gail Fischer stated:

*SHE STATED TO ME SHE HAD BEEN LIVING THERE.*

(J.A.10) (emphasis added) Officer Entress further admitted that his memory of the incident could conceivably have been better on September 11, 1985 than it was on August 18, 1986. (J.A.12)

At the preliminary hearing, Officer Entress testified that his purpose for going to Ed Rodriguez' apartment at 3510 South California was to arrest Rodriguez for battery. Upon his arrival at the apartment, Officer Entress stated that he knew that Rodriguez was probably sleeping. (S.R.17) Officer Entress further testified that he did not bother to check with the landlord to find out whose apartment it was or to determine if the apartment was in

the exclusive name of Edward Rodriguez. (J.A.14) On entering Rodriguez' apartment, without knocking, (J.A.13) Officer Entress admitted that he looked through some Tupperware containers in the living room area and then looked through some briefcases in the bedroom area, all while Rodriguez was asleep in his bed. He testified that this process took approximately one and a half minutes before he woke Rodriguez to arrest him. (S.R.18-20)

At the preliminary hearing Gail Fischer was called as a witness by the state. When the Assistant State's Attorney asked Gail Fischer whose address was 3519 S. California, her response was, "Ed's." When the Assistant State's Attorney asked Ms. Fischer if anyone else lived there with Ed, her response was, "No." (S.R.24) Under cross examination, Gail Fischer stated that on July 26, 1985, she was living with her mother at 3554 South Wolcott; not at 3519 S. California. (S.R.25,26) Gail Fischer said that she was testifying for the state voluntarily and that she was not under subpoena. (S.R.27)

On August 18, 1986 a hearing was held on the respondent Rodriguez' motion to suppress evidence. At that hearing three witnesses were called; Officer Entress, Dorothy Jackson and Gail Fischer.

During his conversation with Gail Fischer at the Wolcott address, Officer Entress testified that he asked her the following question:

Q Tell me what you asked her?

A Ok. I asked her if Ed Rodriguez dealt in narcotics?

Q Ok. You asked her that?

A Yes.



Q What did she say?

A She didn't answer. . . .

(J.A.23)

Earlier in his testimony, Officer Entress had stated that he recalled having a conversation a year earlier with someone concerning an Edward Rodriguez and drugs. (J.A.22)

Prior to Officer Entress questioning Gail Fischer about whether Ed Rodriguez was a narcotics dealer, Gail Fischer was reluctant, and said she wasn't sure she wanted to sign a complaint. Officer Entress then questioned her concerning Rodriguez' narcotics dealings, and told her that if she was afraid of the police going into the apartment and locking him up, then she should tell the police that and they would not go in the apartment. It was after that statement by Officer Entress that, according to his testimony, Gail Fischer agreed to go open the door for the police. (J.A.23)

Dorothy Jackson, the mother of Gail Fischer, testified that on July 1, 1985 (25 days prior to the arrest of Mr. Rodriguez), she had assisted Gail Fischer in obtaining her clothing from Ed Rodriguez' apartment on California and that she moved out of that apartment on that date and in with her mother at the Wolcott address. (J.A.38,39) Under questioning by the court, Dorothy Jackson stated that between July 1st and July 26th, 1985, on two or three occasions Gail Fischer would return home at three or four o'clock in the morning, but that she would stay at Dorothy Jackson's apartment. (J.A.44,45)

Dorothy Jackson later testified to her recollection of the conversation between Gail Fischer and the officers. She stated as follows:

> Q. Well, tell the court the parts you heard if you would?
>
> A. Okay. She said that he beat her up and they wanted to know if she wanted to go over there and let them in. If she could let them in to get him. And she was hesitant and they said why has he got some – I'll use a difference [sic] word –
>
> Q. What is the word the officer said?
>
> A. Well, I – I don't talk that way. I don't want to say it, but another word for has he got crap in the apartment or drugs you know. And she says – just looked at them and then she said yes. And I said I believe he had it too. And that's why she was afraid to go –

(J.A.49)

Gail Fischer was the last witness to testify at the hearing on the motion to suppress. She confirmed that on July 1, 1985 she moved her children and their clothing out of Mr. Rodriguez' apartment and moved in with her mother at 3554 South Wolcott. (J.A.63) Fischer further testified that she never told the police that she was living with Rodriguez at 3519 South California, and that she had the key to Mr. Rodriguez' apartment without his permission. (J.A.65,66) Under questioning by the court, Gail Fischer testified that her name was not on the lease for Mr. Rodriguez' apartment, that she never contributed to the rent during June or July of 1985, that she never



invited her friends over to Mr. Rodriguez' apartment while he was not present, and that she never went over to Mr. Rodriguez' apartment when he was not home. (J.A.89-91)

The trial court, relying upon Illinois case law, found that Illinois would not allow for police to act on the apparent authority of a person in allowing the search of an apartment, and further, upon reviewing all the factors involved, that Gail Fischer did not have actual authority to permit the search. (J.A.94) In concluding that Gail Fischer had no actual authority to consent to search, the court found that one of the most important factors in that determination was that when she left Mr. Rodriguez she took her children with her. The court concluded therefor that she had no right or control over the apartment to allow the police entry to search and also found specifically that there were no exigent circumstances. (J.A.96)

The trial court made no findings concerning the good faith or reasonable belief of the police officers.

## SUMMARY OF ARGUMENT

In the search in the present case, tactical officers from the Chicago Police Department chose to bypass the constitutionally-preferred procedures of obtaining an arrest warrant or search warrant, and even chose to bypass a front-door arrest procedure. Instead, on the pretext of making a battery arrest, the police entered respondent's apartment without knocking and searched for drugs in Tupperware containers and briefcases for a full minute-and-a-half before confronting respondent. The State seeks

to justify this highly intrusive warrantless residential search on the ground that the police had the consent of respondent's girlfriend to enter the apartment, even though *she did not live there.*

The Illinois courts that reviewed this search concluded that Gail Fischer was not a co-inhabitant as required by *United States v. Matlock*, 415 U.S. 164 (1974), and the Illinois "joint access" rule. That conclusion is clearly correct.

The State seeks to salvage this pretextual warrantless search by attempting to erect an "apparent authority" to consent doctrine. This Court should not reach that issue in this case, however, because the Illinois courts have rejected the apparent authority argument based upon Illinois State law which recognizes only *actual* authority as a legitimate basis for a third-party consent to search. Thus the rejection of apparent authority to consent in this case is based on independent and adequate state law grounds.

Examination of the State's argument serves to underscore the wisdom of the Illinois position. To begin with, the terminology of "apparent authority," which derives from the law of agency, is wholly inapplicable to this case. Gail Fischer was not an agent of the respondent in any way.

Likewise, the reasonable-factual-mistake doctrine of *Maryland v. Garrison*, 480 U.S. 79 (1987), is inapposite to the setting of police decision making in this case. The warrantless search of respondent's apartment did not occur because of an unavoidable factual error. It occurred because the police officers *chose* to ignore constitutional



principles and to conduct a warrantless search on the basis of what was at best a highly dubious third-party consent. Unlike the officers in *Garrison*, these officers were not the victims of an unavoidable error; rather, if they believed Fischer had authority to consent it was only because they did not make even the most minimal of efforts to inform themselves by asking the questions required to determine whether Fischer met the *Matlock* standard. The *Garrison* approach should not be applied to police decisions to undertake warrantless searches when constitutionally-preferred procedures are readily available.

Moreover, the police conduct in this case did not rest on any reasonable misassessment of Gail Fischer's status. According to *police* testimony, Fischer told them she *"used to live there"* or "had been living there." Despite the red flags apparent in either of these statements, the police officer testified he *did not ask further questions*. That is not reasonable police conduct.

Indeed, the evidence presented below raises serious doubts as to whether the police even acted in good faith. The procedure chosen by the police was plainly designed to allow a no-knock, surprise search for drugs; it was not in any way necessary merely to make a battery arrest. Moreover, the police apparently told Fischer she "had to" consent or a battery charge would not be made against respondent. On the record in this case, it is not at all clear that the police "mistake" regarding Fischer's authority was anything more than a deliberate refusal by them to ask questions to which they did not want to hear answers.

Finally, for the reasons stated above, even if this Court had ever created a "good-faith exception to the exclusionary rule," this case would not be an appropriate candidate for its application.

## ARGUMENT

### I. GAIL FISCHER DID NOT POSSESS COMMON AUTHORITY OVER RESPONDENT'S APARTMENT AND COULD NOT GIVE POLICE CONSENT TO ENTER.

The Illinois courts have consistently applied a "joint right of access" test to determine the validity of a third-party consent to search since the 1954 decision in *People v. Shambley*, 4 Ill.2d 38, 122 N.E.2d 172, 174. *See also, People v. Walker*, 34 Ill.2d 23, 213 N.E.2d 522, 555 (1966); *People v. Miller*, 40 Ill.2d 154, 238 N.E.2d 407, 409 (1968); *People v. Bochniak*, 93 Ill.App.3d 575, 417 N.E.2d 722, 724 (1981); *People v. Vought*, 174 Ill.App.3d 563, 528 N.E.2d 1095, 1100 (1988). In its 1974 decision in *People v. Stacey*, 58 Ill.2d 83, 317 N.E.2d 24, 26-28, the Illinois Supreme Court endorsed the statement of a "common authority" test for third-party consent set forth by this Court in *United States v. Matlock*, 415 U.S. 164 (1974). According to *Matlock*, "Common authority is . . . not to be implied from the mere property interest a third party has . . . but rests rather on mutual use of the property by persons *generally having joint access or control for most purposes.*" *Id.* at 171 n. 7 (emphasis added). *Matlock* expects that persons who can meet this standard are "co-inhabitants." *Id.*

The Illinois courts are clearly correct in ruling that Gail Fischer did not have common authority over the



apartment searched on the date the search occurred. Far from being a "co-inhabitant," Fischer *and her children* were living at her mother's house on the date of the police search. The trial judge found that Fischer "was not a usual resident" of the apartment, (J.A.95, 96) but was "a rather infrequent visitor or resident or guest or invitee." (J.A.95) The judge also found that "Fischer apparently was not [at the apartment] when the [respondent] was not there" and that she was like "a guest who only has access to a place when his host was there," (J.A.95) and "was not allowed . . . to invite other people, friends or acquaintances [to the apartment] on her own." (J.A.96) These factual findings clearly show that Fischer did not meet the *Matlock* standard of a person who "generally [had] joint access or control for *most* purposes." Fischer was not a "co-inhabitant" who had "the right to permit the inspection in his own right and that the others have assumed the risk that one of their members might permit the common area to be searched." *Matlock*, 415 U.S. at 172 n.7. Clearly, if Fischer did not have authority to invite a friend in, she certainly did not have authority to invite the police.

In fact, one uncontested but salient fact in this case distinguishes it from *Matlock* and from the other cases the State and the Solicitor General cite as correctly applying *Matlock*. *Fischer was not respondent's wife.* While *Matlock* makes it clear that a matrimonial relationship does not suffice to establish "common authority," it is virtually always present in cases finding "common authority" to

consent.[2] There was, however, only a casual relationship between Fischer and the respondent. (Respondent was Fischer's "boyfriend.") (S.R.4)[3]

Moreover, the point in *Matlock* regarding property interests was that a mere property interest in the premises does *not suffice* to show "common authority" to consent to entry. In the present case, Fischer did not even have a property interest in the apartment. The trial judge found "[s]he was not on the lease and did not contribute to the rent." (J.A.95) A name on a lease is not "the precise type of property concept . . . condemned in *Matlock*" (Ill.Br.30); rather it is the kind of property interest the court assumed would underlie – but not suffice for – claims that third parties had co-authority to consent.

The State's argument that Fischer meets the *Matlock* "co-inhabitant" standard consists primarily of assertions

---

[2] E.g., the State relies on *State v. Madrid*, 91 N.M. 375, 574 P.2d 594 (1978), as a case "with facts similar" to the present case. (Ill.Br.31) But the third party in *Madrid* was, as the State admits, a *wife* (Ill.Br.31). That is not "similar" to the present case. Likewise the State relies on *Sullivan v. State*, 716 P.2d 684 (Okl.App.1986), but that case also involved a *wife* (Ill.Br.33).

The Solicitor General cites three federal decisions in its footnote arguing that Fischer meets the *Matlock* standard for actual authority to consent. As the parenthetical descriptions of all three cases show, the third party who gave consent in each case was the wife of the defendant. (S.G.Br.20 n.16)

[3] The presence of a matrimonial relationship is so commonplace in the cases finding "common authority" that the Amicus Brief filed by Americans for Effective Law Enforcement bases its argument on the erroneous assumption that Fischer was "defendant's wife." (A.E.L.E.Br.8) She was not.



that ignore, contradict, or artfully distort the factual findings made by the trial judge – findings that must be upheld under Illinois law unless they are clearly erroneous. *People v. White*, 117 Ill.2d 194, 512 N.E.2d 677 (1987). For example, the State's brief presents arguments regarding Fischer's possession of a key to the apartment. (Ill.Br.28) Mere possession of a key does not create common authority under *Matlock*. See *e.g. People v. Weinstein*, 105 Ill.App.2d 1, 245 N.E.2d 788, 790 (1968). Keys may be possessed by third parties for a multitude of reasons, only some of which could be viewed as tending to indicate common "control for *most* purposes." *Matlock*, 415 U.S. 164, 171 n.7.[4] Indeed, this Court refused to give weight to the mere possession of a key in *Stoner v. California*, 376 U.S. 483 (1964) (hotel clerk's possession of guest's key did not confer authority to consent to search of guest's room). In the present case, Fischer testified that she, in effect, *stole* the key. (J.A.65-66) A stolen key can hardly create "common *authority*" to consent. It is true that there is conflicting testimony on how Fischer came to have the key. The State, however, improperly asks this Court to make a factual finding and accept a version of how Fischer came to have this key that is most favorable to the State (the losing party) when the trial judge, who heard the witnesses, explicitly stated that he could not decide how Fischer came to have a key on the date of the search. ("The key question, I think is neutralized . . . I don't know on the key." (J.A.95) The key is irrelevant to the question whether Fischer had "common authority."

---

[4] How many neighbors have been given keys to water plants or take in the mail while a resident is away?

Similarly, the State repeatedly makes misleading assertions about the whereabouts of Fischer's property at the time of the search,[5] and stresses the irrelevant fact that Fischer left several large items in the apartment when she moved out approximately a month before the search occurred, including a stove, refrigerator and some furniture.[6]

Gail Fischer does not even approach *Matlock's* "co-inhabitant" status.

## II. THE ONLY ISSUE PROPERLY BEFORE THE COURT IS WHETHER GAIL FISCHER HAD ACTUAL AUTHORITY TO CONSENT: THE ILLINOIS COURTS' RULING THAT ONLY ACTUAL COMMON AUTHORITY CAN SUPPORT A CONSENT TO SEARCH RESTS EXCLUSIVELY ON ILLINOIS STATE CONSTITUTIONAL LAW AND SHOULD NOT BE DISTURBED BY THIS COURT.

As this Court reiterated in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), when a state court decision is based

---

[5] For example, that "*all* [Fischer's] possessions remained at [respondent's apartment]." (Ill.Br.30) (emphasis added) In fact, Fischer had taken her and her children's clothing when she moved in with her mother. (J.A.38-40, 63).

[6] The trial judge did not find these facts significant enough to address them in his findings, and the reason is clear enough. As Fischer testified, she left those items behind on loan to respondent because there was no need or room for them at her mother's apartment and respondent otherwise would not have those items to use. (J.A.82,95) Clearly, the mere loan of appliances or furniture, or the mere storage of other items like dishes, does not give rise to "common authority" over an apartment. The trial judge was correct to ignore these facts.



"on bona fide separate, adequate and independent [state law] grounds, we, of course, will not undertake to review the decision." This Court has previously recognized that its jurisdiction must be exercised on an issue-by-issue basis.[7]

As argued by the State, this case presents two distinct issues: (1) whether Gale Fischer had actual common authority to consent to the search of respondent's apartment; and (2) if she did not possess actual authority, whether the search can be justified by resort to arguments based upon "apparent authority" or a reasonable appearance of authority.[8]

While respondent concedes that the Illinois Appellate Court relied on federal law (*Matlock*) in deciding the first question, it is readily apparent that both the trial court and the Illinois Appellate Court considered only state law in turning aside the State's "apparent authority" arguments. The Illinois courts' insistence that only actual common authority can suffice for a consent to search – a position with deep roots in Illinois state constitutional law – is clearly a "bona fide separate, adequate and

---

[7] E.g., *Illinois v. Gates*, 462 U.S. 213 (1983).

[8] It is evident that the requisites for actual "common authority" to consent is an entirely different matter in conceptual terms from the question of whether any grounds other than actual "common authority" should be recognized as providing a legally valid justification for a "consent" search. For example, the text of the Solicitor General addresses only the latter issue of a reasonable appearance of authority to consent, confining its discussion of actual authority to a footnote. S.G.Br.20 n.16

independent" state law ground for the rulings in this case. Therefore, under principles of jurisdiction, federalism, and comity, only the issue of whether the Illinois courts correctly construed *Matlock's* concept of "common authority" is properly before the Court.

As this Court has previously recognized,[9] Illinois is a state with a long tradition of granting protections against unreasonable searches as a matter of state constitutional law that extend beyond those afforded by the Fourth Amendment.[10] As discussed in Section I, *supra*, the Illinois Supreme Court has consistently required actual common authority for consent searches for 36 years beginning with the *Shambley* decision.[11] Moreover, the

---

[9] E.g., *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983) (recognizing the independent adoption of a state exclusionary rule by Illinois in 1923, prior to *Mapp to Ohio*, 376 U.S. 643 (1961)).

[10] It is noteworthy that the Constitutional Commentary to Art. I, §6, the Illinois Search and Seizure provision, explains that: "Section 6 *expands upon* the individual rights which were contained in Section 6 of Article II of the 1870 Constitution and the guarantees of the Fourth and Fourteenth Amendments to the United States Constitution. Illinois Constitution, Art. I, §6, Constitutional Commentary, Smith-Hurd Ann. Stat. (1971) (emphasis added).

[11] The decision in *People v. Shambley*, 4 Ill.2d 38, 122 N.E.2d 172, 173 (1954) was expressly grounded on the Illinois state constitution's search and seizure provision, Section 6 of Article I, and does not mention the Fourth Amendment. Of course, following the increase in federal search and seizure cases in the aftermath of the 1961 decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), Illinois cases also refer to federal cases. For example, several Illinois cases cite *Stoner v. California*, 376 U.S. 483 (1964). Because the decision in *Stoner* was entirely consistent

(Continued on following page)



record in this case leaves no doubt that the rulings of the Illinois courts rejecting the State's arguments regarding "apparent authority" to consent have been based *exclusively* on the controlling Illinois Supreme Court decisions.

Judge Schreier, who decided the motion to suppress, recognized that federal law may differ, but relied on the controlling Illinois law:

> I think I am obliged to follow the present situation in Illinois which would not allow for police to act on the apparent authority of the person in allowing the search of an apartment, the person in this case being Gayle [sic] Fischer. Maybe that will change. It might change tomorrow.
>
> The present state of the law does not allow for it and *Adams*[12] can only be instructive and I think can only really be acted on and adopted by a reviewing court and not by the trial court, given

---

(Continued from previous page)

with the existing Illinois rule in *Shambley*, however, *Stoner* simply reinforced the Illinois courts' commitment to their existing rule. At no point did Illinois change its existing rule because of federal decisions. It is thus evident that the Illinois Supreme Court has viewed itself as continuing to set forth the *Illinois* search law rule in the cases following *Shambley*. E.g., *People v. Bochniak*, 93 Ill.App.3d 575, 417 N.E.2d 722, 724 (1981) (referring to "the strong Illinois trend" of refusing to apply the "apparent authority doctrine"; *People v. Vought*, 174 Ill.App.3d 563, 528 N.E.2d 1095, 1100 (1988) (referring to "decisions in prior Illinois cases rejecting [the apparent authority doctrine]"). Thus the *Shambley* standard has continuously been the law of Illinois for 36 years.

[12] The reference to *Adams* is a reference to, *People v. Adams*, 53 N.Y.2d 1, 422 N.E.2d 53 (1981), a case the State had cited in its "apparent authority" argument.

> the fact that there are Illinois reviewing court opinions on the subject.

(J.A.94)

The Illinois Appellate Court also chose to adhere to the Illinois case law and rejected the apparent authority argument presented by the State:

> In reviewing the record in the instant case, we note that the trial court properly rejected the State's contention that Fischer had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority.

(J.A.103)

Finally, and significantly, the Illinois Supreme Court declined to review the Appellate Court's decision notwithstanding the State's request for the court to consider whether "apparent authority" to consent would justify a search. *People v. Rodriguez*, 125 Ill.2d 512, 537 N.E.2d 816 (1989). Thus, the record in this case shows a consistent application of *state* law requiring nothing less than actual common authority for consent to search.

It is true that the Illinois Appellate Court's opinion does not contain an explicit statement, per *Michigan v. Long*, 463 U.S. 1032, 1042 (1983), that its rejection of any consideration of "apparent authority" arguments is based exclusively on state law. But such a statement is hardly necessary here because it is beyond any argument that it is *impossible* for the Illinois Appellate Court's ruling on this issue to rest on its interpretation of federal decisions.



The Illinois Appellate Court opinion only cites a single federal case, this Court's ruling in *Matlock*, and the discussion of *Matlock* is confined to its rendition of the requisites for common authority sufficient to support consent to a search. (J.A.102) Significantly, however, the Illinois Appellate Court does not refer to *Matlock* in connection with its ruling that "apparent authority" or a reasonable appearance of authority to consent cannot suffice to justify a search under Illinois law. Indeed, there is no way the Illinois courts could have gained any guidance from *Matlock* on the issue whether anything less than actual common authority can support a consent to search, because *Matlock explicitly declines to address that question*. See *Matlock*, 415 U.S. at 177 n.14. It is patent that an opinion that expressly declines to reach an issue cannot be "relied on" in any way in deciding that issue. Therefore, the only issue properly before this Court is whether the Illinois Appellate Court properly interpreted and applied the requisites for actual common authority set forth in *Matlock*.[13]

Declining to reach any issue other than the application of the *Matlock* standard would also be prudent given the state of the record below. Because there was no question but that Illinois law would accept only actual common authority as a basis for a third-party consent,

---

[13] Because this Court's order has granted certiorari on both of the questions presented by the State, respondent, in deference to the Court, will address the merits of the State's "apparent authority" argument. Respondent does so, however, without conceding that the "apparent authority" issue is properly before the Court.

respondent did not seek to develop a full record regarding police motivations or perceptions that might be relevant to the application of a "reasonable appearance of authority" claim. Likewise, the trial court made no such findings. Surely, if "apparent authority" is as widely used in federal cases and the cases of other states as the State and the Solicitor General claim, then this Court will have better opportunities to decide this important issue.[14]

## III. GAIL FISCHER DID NOT POSSESS "APPARENT AUTHORITY" TO CONSENT TO ENTRY.

The briefs filed by both the State and the Solicitor General loosely intermix arguments based on "apparent authority" to consent and on "appearance of authority" to consent as if they were substitutable. They are not.

The term "apparent authority" has well-known connotations in the law of agency. In agency doctrine, of course, it is hornbook law that an agent is said to have "apparent authority" (as distinguished from actual authority) if the principal has represented or manifested

---

[14] The Solicitor General's brief seriously oversimplifies the situation below when it states that the Illinois courts "have not passed on the application of apparent authority principles to the facts of this case." (S.G.Br.20 n.17) In fact, the facts that would be pertinent to the application of any such "principles" have not been developed in the testimony because third-party consent cannot be based on anything less than actual authority under Illinois state law. By the time this Court rules in this case, approximately five years will have expired since the search at issue. That is hardly an ideal time to begin to take testimony on police conduct to resolve issues relating to the potential pretext and bad faith suggested by the existing record in this case. See Section IV.B.2.



in some other way to a third party that the agent is authorized to act on behalf of, and bind, the principal in dealings with the third party. It is also hornbook law, of course, that *an agent cannot create apparent authority by his own representations;* rather, apparent authority can only be created by the manifestations the principal makes to the third party. *Restatement (Second) of Agency*, §27 (1958). So far as respondent can determine, the terminology of "apparent authority to consent" may have come into use in search cases because certain landmark decisions did involve *agency law* arguments.[15] Moreover, it is possible that "apparent authority" terminology has been used in some state and federal decisions in this area because the third party who consents to a search typically is a person with some type of formal relationship to the defendant – usually a spouse (see *supra* p. 14, notes 2, 3) – which might be viewed as giving rise to a colorable agency relationship.

---

[15] For example, in *Stoner v. California*, 376 U.S. 483 (1964), this Court refused to uphold a search of an occupied hotel room on the basis of the consent of the hotel clerk rather than the consent of the hotel guest renting the room. It appears California argued that when a hotel guest turned in his key to the desk clerk when going out, the guest conferred apparent authority on the clerk to consent to entry of the guest's room. In rejecting the third-party consent in *Stoner*, this Court wrote that "[t]he rights protected by the Fourth Amendment are not to be eroded by strained *applications of the law of agency* or by unrealistic doctrines of *"apparent authority." Id.* at 488 (emphasis added). Although *Stoner* clearly disapproves of "apparent authority" claims in consent searches (i.e., *Stoner* refers to "unrealistic claims of 'apparent authority' "), it is possible that it may nonetheless have introduced apparent authority terminology to third-party consent search cases.

The instant case, however, does not require that this Court address the question whether or how agency law applies to a third-party consent to search. The salient feature of this case is that there is absolutely no plausible agency relationship.[16]

There is not even a suggestion that respondent ever represented to the police that Fischer was his agent or that he had conferred upon her any authority to consent to their entry. Neither is there any marriage relationship from which even a "strained" argument of an "agency" relationship could conceivably be made. The doctrine of apparent authority is totally inapplicable to this case. The usage of this terminology by the State and the Solicitor General seriously obfuscates the issue by implying Fischer had a stronger relationship to the respondent and his apartment than she did.

---

[16] The "apparent authority" doctrine is not used as widely in third-party consent cases as the State suggests. While the state and federal decisions the State cites in footnote 1 of its brief often refer to "apparent authority," many are actually decided on actual authority grounds or other grounds. See cases cited at Ill. Br. 13, n.1.



## IV. THE SEARCH CANNOT BE JUSTIFIED ON THE GROUND THAT GAIL FISHER APPEARED TO HAVE AUTHORITY TO CONSENT IN THE EYES OF THE POLICE.

### A. The Ill-considered *Police Decision* to Undertake an Especially Intrusive Warrantless Search of Respondent's Residence Should Not Be Equated With the Unavoidable Factual Error Committed by Police During the Execution of a Search Warrant in *Maryland v. Garrison*.

Both the State and the Solicitor General argue that this case should be decided using the reasonable-factual-mistake approach set forth in *Maryland v. Garrison*, 480 U.S. 79 (1987), and *Hill v. California*, 401 U.S. 797 (1971). The dangerous premise underlying their position is an implicit claim that the police have no duty to take even obvious steps to inform themselves as to the validity of the authority of a third-party whose "consent" is to provide a legal justification for an otherwise blatantly unconstitutional warrantless search of a residence. The approach taken in *Garrison* and *Hill* should not be applied here.

*Garrison* and *Hill* excuse only genuine *unavoidable* factual errors made by police in the course of *executing* searches or arrests.[17] In contrast, this case involved an

---

[17] In *Garrison* the police were executing a warrant search of an apartment when they unknowingly entered a second apartment. The physical layout of the apartment was such that the officers had no way of knowing that they had strayed beyond the warrant. Significantly, in *Garrison*, the police had

(Continued on following page)

unwarranted police decision to bypass constitutionally-favored procedures and conduct a highly intrusive warrantless search on the basis of an obviously dubious "consent" by a third party known to be hostile to the resident of the apartment. As set forth below, there is nothing reasonable, unavoidable, or understandable about the cavalier police disregard of Fourth Amendment rights in this search. There is simply no comparison between the dimensions of the police errors in *Garrison* and *Hill* and the ill-considered, if not outright bad faith (see Section IV.B.2, *infra*), choice made by the officers in this case.

Unlike the situation involving unavoidable factual errors in *Garrison* and *Hill*, the police clearly had the opportunity to avoid the unconstitutional search of respondent's apartment. These experienced officers[18] did not inadvertently fall into error; rather they *chose* to ignore at least three alternative *valid* means of proceeding, and they did so despite clear constitutional preferences for those alternative procedures. First, the police could have obtained an arrest warrant, but – despite this Court's emphatic disapproval of warrantless entries of

---

(Continued from previous page)

followed constitutionally-favored procedure and obtained a search warrant prior to the search. In *Hill*, the police went to Hill's apartment to arrest Hill; when Miller came to the door of Hill's apartment he matched the description the police had of Hill and the police were not able to detect their mistake. (Miller did show the police his identification but it is understandable that the police would be too skeptical of the possibility of forged identification to release an arrested suspect on that basis alone.)

[18] Officer Entress was a 12½ year veteran. (J.A. 3)



residences for purposes of effecting arrests, *Payton v. New York*, 445 U.S. 573 (1980) – the police chose to make a warrantless entry. Second, the police could have sought to obtain a search warrant to search for drugs in respondent's apartment,[19] but – despite this Court's repeated statements that warrant searches are preferable to warrantless searches, especially when a residence is involved – the police did not seek a search warrant. Third, if the police were primarily interested in arresting respondent for battery, the police could have simply knocked on the door to his apartment and made a front-door arrest when he answered (as occurred in *Hill*). Alternatively, the police could have obtained a summons signed by a judge or a notice to appear signed by a police officer issuing the notice to appear and mailed either of those documents to respondent commanding him to appear in court on a certain date and time.[20]

The police chose, instead, to ignore constitutionally-preferred procedures and enter on the basis of a highly dubious third-party "consent" (the clear indicators, apparent to the police at the time of the search, that Fischer was not a co-inhabitant with common authority to

---

[19] It is likely that the police could have developed probable cause by using Gail Fischer as an informant. She affirmatively answered a police question, before the search, as to whether there were drugs in respondent's apartment. (J.A.49) The police apparently made no attempt to develop probable cause, however; they *did not ask* her further questions to establish her credibility, the basis of her knowledge regarding drugs in respondent's apartment, or the timeliness of her information, etc.

[20] See Ill.Rev.Stat. ch. 38 §107-11 (1987) and §107-12 (1984).

consent are discussed in Section IV.B.1, *infra*), and to undertake an arrest which was clearly a pretext for a search for drugs for which probable cause had not been developed (the pretextual nature of the entry is discussed in Section IV.B.2, *infra*). This police conduct is the antithesis of the faultless police conduct in *Garrison* – where the police *had obtained a magistrate's approval of a search warrant*. Likewise, the procedure chosen by the police in this case was far more drastic and invasive than the front-door arrest procedure followed in *Hill*.[21] *Compare* the typical restrictions on home arrests in effect even prior to *Payton v. New York*, 445 U.S. 573, 616-617 (1980) (White, J., dissenting). In short, there is simply no comparison between the discreet, unavoidable factual errors in *Garrison* and *Hill* and the police decision in this case – which the officers chose to make themselves despite the absence of any exigent circumstances (J.A. 96) – to proceed on the basis of a constitutionally dubious justification for a warrantless entry and search.

The fundamental defect in the State's factual error argument is the premise that the police in this case were simply passive receptors of factual information rather

---

[21] If no one had been in the apartment in *Hill*, no one would have come to the door, there would have been no arrest, and no search would have occurred. In the present case, however, the police entered without knocking, searched for a full minute and half including looking in Tupperware containers and briefcases, and only then determined that respondent was present in the apartment. (S.R. 18-20) Had respondent been absent, his apartment would still have been searched. The front-door arrest in *Hill* is clearly more sensitive to Fourth Amendment values than the procedures utilized here.



than active decision makers with an obligation to inquire sufficiently to make an informed decision as to whether there was justification to conduct a *warrantless* search. The State describes the police in this case as if the officers could do nothing more than passively receive information that came to them.[22] That is ludicrous. These experienced officers had substantial control over the information at their disposal to determine whether Gail Fischer had valid authority to consent to their entry. Specifically, the police can, and should, ask obvious, common sense questions of a third party who is prepared to consent to entry to determine whether the person's relationship to the premises meets *Matlock's* "common authority" standard. In this case, as discussed *infra*, the police could have asked Gail Fischer "Do you live at this apartment at the present time?" If they had asked, they would have learned she did not and, thus, she did not have authority. But *they did not ask* that question, or many questions of any kind, for that matter (see Section IV.B.1, *infra*).

Indeed, if the police choose to make the decision whether to institute a search without obtaining the approval of a magistrate (or, in this case, even of a police superior), the officers clearly have a duty to make the same kind of *informed* assessment of the validity of the

---

[22] The passive characterization of the officer's role is evident in numerous phrases that suggest that information comes to the officers rather than that they acquire it. E.g., the police "reasonably *rely on* objective facts and circumstances" (Ill.Br.9) (emphasis added); "objective facts *presented to* the officers" (*Id.* at 10) (emphasis added); police "can only be expected to deal with *what is apparent* to them" (*Id.* at 20) (emphasis added).

legal basis for the search that a magistrate would be expected to make. Officers in this decision-making situation do not do their duty if they merely seize upon isolated facts that *might* tend to show common authority while they disregard red flags and ignore obvious questions. The State's view, however, would seem to be that if a police officer can identify *any* fact or facts which might tend, considered in isolation, to show authority to consent, then the officer may cease any further inquiry, suspend judgment, and completely ignore contradictory evidence because the police officer had a "reasonable belief" based on "what is apparent" that the third party can give valid consent. The State further suggests that this rather arid conception of the role and capabilities of the police is required lest the police be overburdened and forced to deal with legal "niceties."[23] That is hardly the case.

---

[23] The State relies heavily on the recent Seventh Circuit decision in *United States v. Rodriguez*, 888 F.2d 519 (1989) (no relation to the present respondent) in which Judge Easterbrook writes that:

> Going beneath the surface of the information at hand . . . furnished . . . by a person giving consent – would make the outcome of the search depend on the niceties of property or marital law far removed from the concerns of the Fourth Amendment. Consents would become untrustworthy unless the police spent additional time investigating the authority of the person who gave consent, which in a case like ours would require knowledge of Illinois domestic relations law and the living arrangements of the couple.

With all due respect, Judge Easterbrook has it backwards, and writes as if the only appropriate concern regarding standards

(Continued on following page)



Asking a simple question like, "Do you *currently* reside at this apartment" is hardly burdensome (the person who is giving consent is obviously available to answer) and hardly constitutes an "investigation." Moreover, application of the common-sense *Matlock* standard of "common authority" for "most purposes" (which is the standard the police are *required* to know and apply) hardly demands knowledge of "the niceties" of domestic relations law. If there was a police error here (as opposed to outright bad faith), the police clearly had the opportunity and means to avoid it. The violation of respondent's Fourth Amendment rights in this case resulted from the failure of the police to ask simple questions.

Further, the need for the police to make reasonable efforts to inform themselves before accepting the validity of a third-party's consent is particularly strong given the especially sensitive nature of third-party consent issues. In rejecting any expansive or loose construction of third-party "consent" for a search in *Stoner v. California*, 376 U.S. 487 (1964), Justice Stewart wrote:

> It is important to bear in mind that it was the petitioner's constitutional right which was at

---

(Continued from previous page)

for third-party "consent" is to assure the admissibility of evidence seized under a claim of third-party consent *regardless* of the validity of the consent. If Fourth Amendment rights are taken at all seriously, it is evident that care must be taken so that privacy rights are not too readily sacrificed by bogus third-party "consent". Consents are "untrustworthy" *unless* the police take the time to ask basic questions of the person offering to "consent." Asking about "the living arrangements" is exactly what *Matlock* calls for.

> stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed . . .

*Id.* at 489. This same consideration applies here with equal force. Respondent's Fourth Amendment rights are at stake here, not Gail Fischer's. Only respondent had a legitimate expectation of privacy in the apartment, so only he should be allowed to waive that privacy by consenting to a search.

This Court has stressed the personal nature of Fourth Amendment rights. For example, the Court has held that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Rakas v. Illinois*, 439 U.S. 128, 133 (1978)(quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). It would be incongruous if rights that cannot be vicariously asserted can be vicariously waived,[24] but that is effectively what an endorsement of a loose "appearance of authority" to consent would mean. The Fourth Amendment was written to protect the privacy interests of individual citizens. Citizens' reasonable expectations of privacy are not protected when police fail to make reasonable inquires into the validity of a third party's "consent" to search a residence.

---

[24] It is interesting to speculate what the State's position would be in this case if an illegal search of respondent's apartment had produced evidence incriminating Gail Fischer and Fischer were being prosecuted. It seems highly likely that in that hypothetical circumstance the State would be asserting, on the *same* facts now before the Court regarding Fischer's relation to the apartment, that Fischer lacked a sufficient "legitimate expectation of privacy" in respondent's apartment to have standing to challenge the search.



Contrary to the State's claims, this Court will not impair any *legitimate* law enforcement interest by refusing to stretch *Garrison's* reasonable-factual-error doctrine to instances -- like the present case – in which the police deliberately choose to forego obtaining a search warrant because they think they can seize upon an isolated fact or two to concoct an allegation of third-party consent to search. As this Court has indicated repeatedly, the Fourth Amendment contains a strong preference for warrant searches over warrantless searches, including consent searches.[25] Approval of a loose "reasonable appearance of third-party consent" standard would amount to an open invitation for police to subvert the warrant preference. It would also invite the police to disregard the *Matlock* "common authority" standard and replace it with the rule of thumb that a third-party consent can be based upon *any* isolated indicia of potential cohabitation (e.g., storage of furniture or mere possession of a key) that could arguably present a "reasonable appearance" of authority to consent. The practical import of a "reasonable appearance" standard would be to teach the police to *not ask* the very questions about living arrangments which the *Matlock* standard requires.

---

[25] *See e.g., Gates*, 462 U.S. at 236 (given the "Fourth Amendment's strong preference for searches conducted pursuant to a warrant," warrant affidavits submitted by police should not be reviewed hypertechnically lest "the police might well resort to warrantless searches, with the hope of *relying on consent* . . . ")

Mistaken assessments of the validity of third-party consent should be regrettable and infrequent exceptions in police work. The "reasonable-mistake" approach advocated by the State, however, would raise mistaken assessments of consent to the level of standard police practice. This Court should not invite police to take Fourth Amendment rights so cavalierly.

### B. Even If The Approach Taken In *Garrison* Were Applied To The Search In This Case, It Is Clear The Police Had No Reasonable Basis To Believe That Gail Fischer Could Give Consent And There Is Reason To Doubt That The Police Acted In "Good Faith".

Because Illinois law only accepts actual authority as a basis for consent to search, the record below is not fully developed regarding the police conduct in this case. Even so, it is evident that the police at least failed to reasonably inform themselves about the validity of Fischer's authority to consent, and there are ample reasons to suggest that the search at issue was initiated in bad faith, with a willful **disregard of respondent's rights.**

#### 1. Gail Fischer's Statements Plainly Put The Police On Notice That She Did *Not* Possess Authority To Consent.

Gail Fischer was not living at respondent's apartment on the date of the search (or for at least a month before). Consistent with its passive characterization of police officers, the State offers the lame excuse that the officers "were not told" this fact. (Ill.Br.16) However, police testimony shows that Fischer did make statements that put



the police on notice that she was not a current resident of the apartment prior to the search. At the preliminary hearing, Officer Entress testified that prior to the search, Fischer told him "she *used to* live" at respondent's apartment. (J.A.10-11, S.R.16). Subsequently, at the suppression hearing, the same officer testified that Fischer said she "had been living" at the apartment. (J.A.10-12)[26]

Fischer's statement that she "used to live" at the apartment showed conclusively that she was not a co-inhabitant and could not validly consent to police entry of the apartment. There is no way a police officer who heard that statement could "reasonably believe" that Fischer could give valid consent. Indeed, even if Fischer had said she "had been living" at the apartment, the statement is, at best, so wholly ambiguous as to whether she was a resident of the apartment *at the time* that a reasonable police officer would have realized a follow-up question had to be asked of Fischer to clarify her current residence. But *the police did not ask that further question.*[27] As Officer Entress testified, he "didn't go into specific's with her as if she had just moved out or anything like that." (J.A.10) It is undisputed that the police never asked

---

[26] Officer Entress admitted that his recollection of Fischer's words could conceivably have been better on the date of the preliminary hearing when he had testified that Fischer said "she used to live there." (J.A.12)

[27] Officer Entress testified it was his "impression" that she was living at respondent's apartment on the date of the search (J.A.11), but, as the State concedes, subjective police "impressions" are of no weight whatsoever. (Ill.Br.14)

Gail Fischer the obvious question "do you *currently* live at that apartment?"[28]

The failure of the police to pursue the question of Fischer's current residence on the day when she "consented" to their entry is all the more remarkable in light of the officers' awareness of two additional factors. First, they were aware that Fischer was not married to the respondent. (S.R.4) While marriage may not be a precondition for valid consent under *Matlock*, the absence of a marital relationship clearly requires some additional inquiry by the police to determine whether there is substantial co-inhabitation or only casual visitation. Second, the police knew that Fischer was hostile to respondent at the time she gave her "consent" to entry. Indeed, she wanted him prosecuted for battery. It was also obvious that Fischer's mother, a deputy sheriff herself (J.A.35), who was urging her daughter on, was hostile to the respondent. (J.A.76) In that circumstance a reasonable officer would recognize that extra care was required in assessing the validity of the "consent." No care was shown here, however.

Significantly, the record contains no indication that the police asked many questions at all. Although Fischer was interviewed at her mother's home where she was living with her children, there is no indication the police asked about her children's whereabouts. Moreover, there

---

[28] Fischer's alleged casual use of the phrase "our apartment" can hardly be a sufficient ground for excusing the police from determining her current residence. Given that she "used to live there," it would not be surprising if she still sometimes called respondent's apartment "ours."



are no findings by the trial judge regarding the credibility of police testimony in the present case. It is highly implausible, however, that Fischer ever made one statement which the State relies on heavily. The State, based on Officer Entress' testimony, claims that Fischer told the police that *"all her clothes* and her furniture were in [respondent's] apartment . . . " (Ill.Br.14, 15 (emphasis added); see also *id.* at 10 ("all of her possessions")).[29] There is no question, however, that *none* of Fischer's clothing was in respondent's apartment[30] – a factual inconsistency the State attempts to hide with artful language.[31] Hence it is highly implausible that Fischer ever told Officer Entress *"all"* or even any of her clothing was at respondent's apartment.[32] The implausibility of that police testimony also calls into question the credibility of other police claims regarding what Fischer told them before the search.[33] The record below simply does not

---

[29] The trial judge made no finding regarding the credibility of this police testimony regarding Fischer's statements.

[30] The trial judge *found* that Fischer had "taken the clothes" to her mother's. (J.A.96).

[31] The State asserts that Fischer took "three bags of clothing" (Ill.Br.26) or "some clothing" (Ill.Br.27). In fact, however, there is nothing in the record to indicate that Fischer left any clothing *at all* in respondent's apartment. (*See* J.A.38-40; 63)

[32] Fischer had no motive to lie about this; she had no reason to believe that the location of her clothing could affect the police handling of the battery incident.

[33] That Fischer told the officers she had "her own key" to respondent's apartment (J.A.6) is not corroborated by Fischer's or Jackson's testimony.

establish that the police had reasonable grounds to think Fischer co-inhabited the apartment to be searched.

### 2. There Is Ample Reason To Doubt That The Police Conducted This Search In "Good Faith".

The State's brief asserts numerous times that the police acted in "good faith" in conducting this search. That is merely an advocate's bald assertion. The trial court made no finding whatsoever regarding the motives or state of mind of the police. Had the court considered the issue, however, there is ample evidence that would have allowed Judge Schreier to conclude that the police did not act in good faith. In particular, the pattern of the police conduct strongly suggests that the officers were primarily interested in springing a no-knock, surprise search for drugs and that the battery arrest was simply a pretext to gain admission to respondent's apartment without his knowledge of their entry. In addition, there is testimony that suggests that Fischer was effectively coerced into opening the door of the apartment.

If the officers were simply trying to effectuate a battery arrest, there was no reason for them to do anything but knock on respondent's front door and arrest him when he answered. That is not what the police did, however. The events leading to this search began when Fischer's mother, Dorothy Jackson – a law enforcement officer herself (J.A.35) – called the police regarding her daughter having been beaten. Officer Tenza responded to the call and met Fischer and her mother at their apartment. Although the record is not fully developed, it is



apparent that the subject of drugs in respondent's apartment came up because Officer Tenza promptly called in officers from the Chicago Police Department's District Tactical Team. (J.A.4) Tactical team officers primarily work with narcotics cases, not simple batteries;[34] obviously the police were seeking drugs here virtually from the outset. After the tactical officers arrived, they asked whether there were drugs in respondent's apartment and were told there were. (J.A.49) Tactical officer Entress had heard rumors of respondent's involvement with drugs on a prior occasion. (J.A.22-24)

Thus, it is quite probable that the police elected to "rely on" a claim that Fischer had given consent so that they would have a pretext to enter and search respondent's apartment for drugs without giving him any advance warning of their entry. That is exactly what they did. The record reveals that the police spent at least one-and-a-half minutes in respondent's apartment before they confronted him. (J.A.18-19) During that time they looked in Tupperware containers and brief cases. (J.A.19-22)

Further, the police officers' apparent desire to make a "consent" entry may well explain the absence of questions – they did not want to hear the answers. Indeed, it even appears that the police told Fischer she *had to* let them into respondent's apartment with a key if she

---

[34] As the trial judge was doubtless aware, the tactical team is a special unit of the Chicago Police Department which deals primarily with narcotics investigations.

wanted him sanctioned for battery.[35] Illinois law, however, did not require Fischer's presence for a battery arrest. Even if Fischer's acquiescence in opening the door might meet the "consent" standard set out in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1974), the coercive character of the police conduct further demonstrates that this is not a case where the officers were "presented with" any "reasonable appearance" of a valid third-party consent.[36]

---

[35] Although the State has characterized Ms. Fischer as having "volunteered" to let the police into respondent's apartment (Ill.Br.15), the testimony shows otherwise:

> Q [by the State]: And you told [the police] he was over at the apartment on California?
> A [by Ms. Fischer]: Yes.
> Q: And you told them you would take them over there, didn't you?
> A: Yes. They told me that was what I had to do.
> Q: They told you you had to do that?
> A: In order to –
> Q: Didn't –
> THE COURT: In order to what?
> A: If I wanted to press charges.
>
> • • •
>
> Q: And you told them that you would let them into the apartment so that they could arrest the defendant correct?
> A: Well they told me that's – That was what I had to do.

(J.A.77-78) This testimony would certainly allow a judge to find that the police effectively required Fischer to accompany them to the apartment solely as a pretext to conduct a warrantless search for narcotics.

[36] Ill. Rev. Stat., ch. 38 §107-2(c)(1982)



Properly viewed, the State's claims of good faith and reasonableness are less than compelling. In the circumstances, it is not clear that the police suffered from any misunderstanding. Their conduct is consistent with an intent to use Fischer and the key she had to gain entrance to respondent's apartment for a surprise drug search and they may well have turned a blind eye to indications that she did not have valid authority to consent. Good faith cannot emerge from the shadow of such questionable police conduct. Good faith must be the exact equivalent of the equitable doctrine of "clean hands."

## V. THE EXCEPTIONS TO THE EXCLUSIONARY RULE CREATED IN *LEON* AND *KRULL* ARE WHOLLY INAPPLICABLE TO A WARRANTLESS SEARCH IN WHICH THE POLICE THEMSELVES DETERMINE WHETHER THERE IS A LEGAL JUSTIFICATION SUFFICIENT TO UNDERTAKE A SEARCH.

In a last ditch argument, the State suggests that the evidence seized in the unconstitutional search in this case should be admitted under "the good faith exception to the exclusionary rule," citing *United States v. Leon*, 468 U.S. 897 (1984).[37] The fact, of course, is that this Court has never announced any "good faith exception to the exclusionary rule."

It is true that *Leon* has become popularly known as a "good-faith exception" – even among some commentators

---

[37] The Amicus Brief of the United States, reflecting a sounder perspective on the inappropriateness of the suggestion, does not join the State's argument. (S.G.Br.13-14 n.6)

who should know better. But this Court obviously took some pains in the *Leon* opinion to avoid that terminology. Indeed, the exception created in *Leon* is explicitly limited to evidence seized in searches conducted pursuant to search warrants that are subsequently found to be constitutionally invalid. 468 U.S. at 922. Likewise, the exception created in *Illinois v. Krull*, 480 U.S. 340 (1987), is explicitly limited to evidence seized in searches conducted pursuant to authority set out in statutes that are subsequently found to be constitutionally invalid. 480 U.S. at 347-55.

The State's brief does parrot language from *Leon* when it asserts that the police in this case "acted in *reasonable, good faith, reliance* on Gail Fischer's apparent authority to permit their entry." (Ill.Br.25) (emphasis added). But this lifting of the "reasonable, good faith, reliance" language from *Leon* is done in total disregard for the logic of the *Leon* rationale.

The justifications for the limited exceptions created in both *Leon* and *Krull* rest on the proposition that the unconstitutionality of the searches in question is primarily, if not solely, the responsibility of judges or legislators who authorized the searches "rather than [the police]." *Leon*, 468 U.S. at 921. In *Leon*, for example, the syllogism for the exception's rationale is that: (1) the exclusionary rule only applies to police violations of the fourth amendment; (2) unconstitutionally-issued search warrants are the fault of the magistrates who issue them "rather than [the police]". Therefore, the exclusionary rule does not apply to evidence seized pursuant to unconstitutionally-issued search warrants. The syllogism in *Krull* is essentially the same. In other words, the Fulcrum on which



both the *Leon* and *Krull* exceptions rest is the common premise that the police are not the primary deciders of whether the kinds of searches under consideration in those cases are constitutionally valid and should be undertaken. In both of those settings, this Court has ruled that the police may rely upon the presumptive validity of the judgment of the magistrate or legislature and, hence, are not required to second guess the judgment of that legal authority.[38]

Given this underlying logic, the terminology of "objectively reasonable reliance [on a magistrate or legislator]" in *Leon* and *Krull* must be read as a term of art that is decidedly *not* equivalent to the general reasonableness standard found in the Fourth Amendment. The police conduct in *Leon* and *Krull* (in both cases, the police conducted a search in the absence of probable cause) *is "reasonable" only in light of the police reliance on the presumptive validity of the decisions of magistrates and legislators*. Indeed, standing alone, the searches in *Leon* and *Krull* could not be viewed as reasonable police conduct in the absence of their reliance on another, presumptively correct, legal decision maker. Thus the term "reasonable reliance" in *Leon* is hardly equivalent to the notion of "reasonableness" found elsewhere in the law. Given *Leon's* underlying logic, and its special use of the term

---

[38] Indeed, *Leon* suggests that the police are virtually required to conduct a warrant search once a warrant is issued: "There is nothing more the police may do." 468 U.S. at 921, quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring) Compare *Massachusetts v. Sheppard*, 468 U.S. 981 (1984)

"reasonable reliance," there is no possible basis for extending the rationale of the exceptions created in *Leon* and *Krull* to situations in which the police are the primary or sole decision makers regarding whether a search should be conducted. *See, United States v. Warner*, 843 F.2d 401, 404-5 (9th Cir. 1988); *United States v. Morgan*, 743 F.2d 1158, 1165 (6th Cir. 1984) *cert. den'd*, 471 U.S. 1061 (1985).

In the instant case, the police cannot be excused from exercising sound judgment on the ground that some other legal decision maker is responsible "rather than" the police. Certainly the State cannot seriously claim that the unconstitutional search that took place here was the fault of Gail Fischer "rather than" the police.[39] As discussed in Section IV, *supra*, the police here did not have any reasonable basis to conclude that valid consent to search had been given, and their decision to search was a careless, if not willful, violation of the reasonableness standard of the Fourth Amendment. No exception to the exclusionary rule is called for in these circumstances.

---

[39] Though that is the implication of the State's language: "Here, the police officers acted in reasonable, good faith, *reliance on Gail Fischer's apparent authority* . . . " (Ill.Br.25)



## CONCLUSION

Edward Rodriguez, as respondent, respectfully urges that the decision below be affirmed.

Alternatively, the respondent urges that, in light of the independent and adequate state law ground for the rejection of any "apparent authority" doctrine in the Illinois courts, the petition for certiorari be dismissed as improvidently granted, or that the case be remanded to the court below for further proceedings.

Respectfully submitted,

JAMES W. REILLEY*
Attorney at Law
2720 River Road, Suite 134
DesPlaines, Illinois 60018
(708) 299-8870
*Counsel of Record

CHRISTINE P. CURRAN
DIANNE RUTHMAN
Attorneys at Law
2720 River Road, Suite 134
DesPlaines, Illinois 60018
(708) 299-8870

*Attorneys for Respondent*

THOMAS Y. DAVIES
Attorney at Law
1505 W. Cumberland Avenue
Knoxville, Tennessee 37996-1800
(615) 974-6819

RICK HALPRIN
Attorney at Law
205 W. Randolph Street
Chicago, Illinois 60606
(312) 419-9898

Of Counsel

No. 88-2018



In The

# Supreme Court of the United States

October Term, 1989

THE STATE OF ILLINOIS,

*Petitioner,*

vs.

EDWARD RODRIGUEZ,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District**

## REPLY BRIEF FOR PETITIONER

NEIL F. HARTIGAN
Attorney General
State of Illinois
ROBERT J. RUIZ
Solicitor General
State of Illinois
JOSEPH CLAPS
First Assistant Attorney General
TERENCE M. MADSEN*
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601
*Attorneys for Petitioner*

*Counsel of Record

CECIL A. PARTEE,
State's Attorney
County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
RENÉE GOLDFARB,
THEODORE FOTIOS BURTZOS,
PAUL GLIATTA,
KEVIN SWEENEY,
Assistant State's Attorneys,
*Of Counsel.*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## TABLE OF CONTENTS

TABLE OF CONTENTS – Continued





TABLE OF CONTENTS – Continued

## TABLE OF AUTHORITIES

Page

CASES:





## TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued





TABLE OF AUTHORITIES – Continued

## I.

## THE ILLINOIS APPELLATE COURT HAS MISINTERPRETED THE FOURTH AMENDMENT BY REFUSING TO RECOGNIZE A VALID EXCEPTION TO THE WARRANT REQUIREMENT WHEN A POLICE OFFICER, IN GOOD FAITH, RELIES ON A THIRD PARTY'S APPARENT AUTHORITY TO PERMIT A CONSENSUAL ENTRY. IN THE ALTERNATIVE, THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD APPLY IF THE WARRANT REQUIREMENT IS NOT EXCUSED.

### A.

### An Entry Or Search Is Reasonable, And Therefore Constitutional, When It Is Performed With The Consent Of A Person Who Reasonably Appears, On The Basis Of All The Information Known To The Police, To Have Authority To Give That Consent.

(Reply To Respondent's Issues III and IV and Issue I Raised By *Amicus*).

In reaching Fourth Amendment determinations, this Court has been guided at all times by reasonableness. "Our fundamental inquiry concerning Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances." *United States v. Chadwick*, 433 U.S. 1, 9 (1977). Throughout the past two centuries, this Court has always favored reasonable conduct on the part of police officers. In this case, the police went to arrest a man who had beaten his girlfriend and broken her jaw. They reasonably believed she had the authority to allow the entry into the apartment where the beating occurred. Respondent and *amicus*[1] expressly ask this Court to condemn the actions of the police officers who reasonably relied on the facts and circumstances presented to them. Such reasonable reliance is the

---

[1] *Amicus* here refers to the National Association of Criminal Defense Lawyers, the only organization to file a brief *amicus curiae* in support of respondent's position.

essence of the apparent authority doctrine. Since the officers reasonably believed they were acting under an established exception to the warrant requirement, and since the information known to them indicated that their entry into the apartment was lawful, their search was both reasonable and constitutional under the Fourth Amendment.

In response to petitioner's argument, respondent and *amicus* have chosen to focus on different considerations. *Amicus* takes the extreme position that the information known to the officers at the time they entered the apartment is irrelevant. *amicus* argues that only consent from someone with actual authority can justify an entry or search, and that consent from a person with only apparent authority should always be rejected. While respondent joins this argument, he fails to give this Court any substantive legal analysis in support of this position, and instead simply stresses that the officers did not in fact possess a reasonable belief that Gale Fisher had the requisite authority to let them into the apartment. By failing to adequately challenge the theoretical bases of the apparent authority doctrine, respondent's brief is most unpersuasive.

## (1)

**The Legality Of An Entry Or Search Conducted Under An Exception To The Warrant Requirement Must Be Determined By The Information Available To The Police When The Search Is Made.**

*Amicus* argues that no matter how valid a consent to enter appears to be, it may be unconstitutional for the police to rely on it. It is also the position of *amicus* that encouraging police officers to seek consents would violate privacy interests protected by the Fourth Amendment. Respondent makes a cursory statement to the same effect. These arguments are not supported by any precedent from this Court. They should be rejected for the following reasons:

1. This Court has repeatedly held that in situations where a warrantless search is permissible, its legality will be determined by the information available to the police at the time.



2. Searches with consent are perfectly constitutional and infringe on privacy rights less than many other kinds of searches.

Searches performed with consent are a well established and perfectly constitutional exception to the warrant requirement. *United States v. Matlock*, 415 U.S. 164 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *Amicus*, however, takes the absolutist position that a valid consent must come from someone with actual authority, and that consent from someone with only apparent authority should not be countenanced by the Fourth Amendment, no matter how valid it appears to be. That position is untenable because it would make the legality of all consensual entries or searches depend, not on the facts and circumstances known at the time, but on facts which might not be known until months or years later. Also, that position is contrary to the rule of law followed by this Court in other kinds of warrantless searches which are recognized as exceptions to the warrant requirement. The general rule is that the legality of a warrantless search is determined by the information available when the search is performed. It follows that if the police reasonably believe that they have received a valid consent to enter or search, then that entry or search is lawful.

For example, this Court has held that the legality of a search incident to arrest is to be determined by the information available to the police at the time. If the police have information showing probable cause to arrest, it does not matter if that information later turns out to be false. *Hill v. California*, 401 U.S. 797 (1971). In *Hill*, the officers mistakenly but reasonably arrested the wrong man. This Court held that the search incident to the mistaken arrest was constitutional.

Respondent attempts to circumvent the precedent of *Hill* by categorizing the reasonable mistake on the part of the officers as "unavoidable." (Resp. Br. 25) Nowhere in *Hill* is the concept of "unavoidability" discussed. The main focus of both *Hill* and *Maryland v. Garrison*, 480 U.S. 79 (1987) was that when police officers reasonably rely on the facts and circumstances presented to them, even if their assessment of

those facts later turns out to be incorrect, their conduct is not proscribed by the Fourth Amendment. In fact, in *Hill*, the mistake which resulted in a warrantless arrest was not necessarily unavoidable. Indeed, arrestee Miller specifically told the officers he was not Mr. Hill, the resident of the dwelling. Nevertheless, based on all the facts presented to the officers, their mistake in arresting Miller was reasonable.

*Amicus* does not join respondent in this "unavoidability" analysis, but simply emphasizes that Hill's arrest was based on probable cause. This fact does not distinguish *Hill* from the instant case; the police unquestionably had probable cause to arrest respondent for aggravated battery. The attempt to distinguish *Garrison* based upon the presence of a warrant is also tenuous. It should be noted that in *Garrison* no warrant actually authorized the search performed by the police officers. Rather, this Court held that the search was justified by the reasonable belief of the officers that a warrant, which actually was for different premises, authorized the search in question.

Another exception to the warrant requirement involves searches of automobiles. *Chambers v. Maroney*, 399 U.S. 42 (1970). This Court has ruled that the legality of a warrantless search of an automobile is to be determined by the facts known to the police at the time they searched the vehicle. *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, the police saw a hunting knife in a car and then searched for more weapons. There were no other weapons in the automobile, but some marijuana was found. This Court found the search to be constitutional.

Another exception to the warrant requirement is a "stop and frisk" based on a reasonable suspicion that the subject is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968). This Court has made it very clear that the legality of a pat-down search after a *Terry* stop is to be judged according to the facts known to the officer at the time of the stop. *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Cortez*, 449 U.S. 411 (1981).



In the recent *Buie* case this Court held that a warrantless "protective sweep," designed for protection of law enforcement officers after an arrest, is justified by the apparent danger to the officers rather than by facts that become known after the search is complete. *Maryland v. Buie*, ___ U.S. ___ (No. 88-1369, February 28, 1990).

Thus the general test applied under a recognized exception to the warrant requirement is that the legality of the search will be determined by the information known to the police at the time of the search, whether that information later turns out to be true or false. *Amicus* argues that it would violate the Fourth Amendment to follow the same rule in cases involving a consent to search or enter. That argument is without merit.

In fact the position taken by *amicus* is fundamentally unsound in that it would turn the question of the legality of a search or entry based on consent into a guessing game. *Amicus* argues that, even when the police believe reasonably and in good faith that they have a valid consent to enter, the entry must be ruled illegal if it turns out later that the consent was given by someone with apparent rather than actual authority. Police officers, however, are entitled to know whether they are complying with the Fourth Amendment or not. Any Fourth Amendment ruling by this Court should be one which the police are able to follow in practice. Therefore, this Court should hold that a search or entry based on consent is valid if the police, relying on the objective facts and circumstances known to them at the time, reasonably believe that they have a valid consent to search or enter.

*Amicus* argues that this rule would erode privacy rights protected by the Fourth Amendment. It is well-established that the reasonableness of a particular practice is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). If this Court were to accept respondent's arguments and reject the doctrine of apparent authority, this would chill the use of consensual searches by law enforcement officers who would not be able to confidently rely

on the totality of the facts and circumstances presented to them at the time. In *Schneckloth*, this Court recognized the important and overriding governmental interest in protecting its own citizenry through the investigation of crime.[2] To this end, this Court recognized the importance and need for consent searches as an effective tool of law enforcement. Indeed, this Court noted that in some situations, "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *supra* at 227.

In fact, a search with consent is a lesser invasion of privacy than many other kinds of searches. When the police seek a consent to search, they give notice to some person having authority over the premises and they give that person an opportunity to refuse consent. Most other searches by police officers involve neither notice nor an opportunity to refuse. Furthermore, in *Hill, supra*, Mr. Hill's privacy rights were affected by the search of his residence which was incident to Mr. Miller's arrest. Nevertheless, as in *Hill*, reasonable police conduct, on balance, outweighed any minor intrusion of respondent's privacy rights.

Respondent's argument is premised on a theory of waiver, which was specifically rejected by this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The argument is as unpersuasive now as it was some two decades ago when Justice Stewart, writing for the majority, stated: "Similarly, a 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions that have approved 'third party consents.'" *Schneckloth supra*, at 245.[3]

---

[2] "If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short a search pursuant to consent may result in considerably less inconvenience for the subject of the search." *Schneckloth, supra* at 228.

[3] The reasoning behind the Court's rejection of a waiver analysis in the area of the Fourth Amendment and specifically regarding consent searches was due to the fact that the ". . . Fourth Amendment stands as a

(Continued on following page)



Respondent also attempts to persuade this Court that it should not adopt an apparent authority to consent doctrine because it would not comport with concepts of agency law. Respondent's argument is gleaned from this Court's decision in *Stoner v. California*, 376 U.S. 483 (1964). Such reliance is misplaced.

In *Stoner*, this Court held that a person who occupies a hotel room does not grant authority to a hotel clerk to let the police into that room. The officers were aware that the third party giving consent was not authorized by the occupant to give such consent. Thus, *Stoner* dealt solely with the question of actual authority and did not decide or discuss the question of whether a search may be justified by consent from a person with apparent authority.[4]

In sum, when an exception to the warrant requirement applies, this Court has looked to the information available to the police at the time of the search in determining whether that search is reasonable under the Fourth Amendment. The same rule should be followed when a search or entry is based on consent. Any Fourth Amendment rule should be one which the police are able to follow, and searches should not be ruled invalid because of facts which become known long after the search has been performed. A rejection of this rule would have a chilling effect on the use of consensual searches which

---

(Continued from previous page)

protection of quite different constitutional values." *Schneckloth* at 241-242. While the court recognized the propriety of such analysis in the context of a defendant's right to a fair trial the court stated " . . . it would be next to impossible to apply to a consent search the standard of an intentional relinquishment or abandonment of a known right or privilege . . . " *supra* at 246.

[4] See R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, 2nd Ed., Vol. 3, (1987), page 262, fn. 96 wherein Professor LaFave states that, "*Stoner* involved a mistake of law rather than a mistake of fact, which does not come within the apparent authority doctrine."

are a significant and integral part of effective law enforcement. Therefore, when police officers reasonably rely on objective facts and circumstances which indicate that they have obtained a valid consent to search or enter then that search or entry is valid under the Fourth Amendment.

**(2)**

**Officers Entress and Gutierrez Were Right To Act Promptly To Protect A Victim Of Domestic Violence, And The Record Shows That They Reasonably Believed That The Victim Had Authority To Let Them Into The Apartment Where She Had Been Injured.**

Respondent argues that the Chicago police officers who arrested him did not have a reasonable belief that Gale Fisher had authority to permit entry into the California Avenue.

The basic question before this Court is whether, as a matter of law, a search or entry is proper under the Fourth Amendment when the police reasonably believe that they have searched or entered with valid consent. Although the usual function of this Court is to rule on principles of law, not on particular facts, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), the facts of this case underscore the necessity for adoption of the apparent authority to consent doctrine.

The actions of Officers Entress and Guiterrez were not only proper, but highly commendable. They acted promptly and effectively on a complaint of serious domestic violence. Furthermore, the record shows that those officers reasonably believed that Gale Fisher had authority to let them into the apartment where her jaw had been broken.

When Officers Entress and Gutierrez talked to Gale Fisher at her mother's home, Ms. Fisher obviously had been beaten up. (J. App. 32) She had a black eye, a swollen jawbone sticking out to the side, a distorted face, bruises on her neck and, although this was not known until later, her jaw had been broken. (J. App. 32, 46, 73) Like many victims of domestic violence, she was somewhat reluctant to press charges. (J. App. 22) It is a reasonable inference that she was upset and emotional. The officers believed that they were



dealing with a serious felony. In fact, they later asked that charges of aggravated battery be approved against respondent. (J. App. 32-33) Ill. Rev. Stat. 1985, ch. 38, sec. 12-4(a).

The officers knew that Gale Fisher had been beaten up by her boyfriend in the apartment at 3519 South California, that all or most of her personal possessions were there, that she had a key to the apartment and that she called it "our apartment." The only reasonable conclusion from that information was that she had authority to allow entry.

Respondent argues that Officers Entress and Gutierrez were required to cross-examine Gale Fisher about her living arrangements. It would not have been proper or feasible to treat a severely beaten victim in that fashion. In the world of real crimes and real people the police must often get information from victims who are in fear, injured, inarticulate or hysterical. A reasonable warrantless search does not require questioning victims of violent crimes as if they were hostile witnesses in a courtroom.

Nevertheless, complete information about Gale Fisher's living arrangements would have shown that during the eight months before respondent's arrest she had been in the apartment at 3519 South California almost every day with respondent's consent and approval. From December, 1984 to July 1, 1985 she lived there and after July 1 she was there virtually every day and many nights as well. (J. App. 55, 73) Thus, respondent is incorrect in his claim that more investigation would have easily resolved the question of whether Gale Fisher had actual authority to let the officers into the apartment. That question has been litigated in this case for the last five years and illustrates the fallacy of defendant's argument and the inherent difficulty of evaluating actual authority. On July 26, 1985, however, the information known by the officers indicated that Gale Fisher had authority to open the apartment door and let them in.

Officers Entress and Gutierrez had a severely beaten victim to protect and did not have five years to decide what to do. The point of maximum risk for a victim of domestic violence is when she defies her abuser and tries to break away

from him. *Handbook for Domestic Violence Victims* (Springfield, Ill: Illinois Coalition Against Domestic Violence, 1986), pp. 5-6; *See* NiCarthy, Ginny, *The Ones Who Got Away: Women Who Left Abusive Partners* (Seattle: The Seal Press, 1987). Officers Entress and Gutierrez did exactly what every police officer should do in serious domestic violence cases, which is to promptly arrest the offender.

After Gale Fisher became a potential witness against respondent he attacked her again, breaking her cheekbone in four places. (J. App. 81-82) It was only then that Ms. Fisher went to respondent's lawyer's office and signed an affidavit claiming for the first time that she had lacked actual authority to let the police into the apartment. (J. App. 84-85) But the information known to the police on July 26, 1985 clearly indicated that Gale Fisher had the right to let them into the apartment where respondent had broken her jaw a short time before.

Respondent argues that the officers used the arrest as a pretext to search for drugs, but that argument is factually false and legally irrelevant. Respondent asserts, with no support in the record, that Tactical Unit Officers like Entress and Gutierrez were primarily narcotics investigators. (Resp. Br. 39) That is a regrettable misstatement of fact, since Tactical Units have general law enforcement responsibilities and do not specialize in narcotics cases.[5] The Chicago Police Department, of course, has a narcotics division, but that unit was not involved in this case in any way.

However, even if the arresting officers had intended to look for narcotics, the entry into the apartment would still have been perfectly proper under the law as stated by this

---

[5] In 1985 the duties of Tactical Units were governed by Chicago Police Department Patrol Division Special Order 79-11 (1979). That order said: "Tactical units have been created to provide district commanders with flexibility in the assignment of personnel in dealing with special problems, and to expand and extend patrol operations. They are not to be considered citizen's dress officers or follow up investigators, and the activities of tactical teams are to be directed toward the patrol mission of protection of property and the prevention of crime."



Court. *United States v. Robinson*, 414 U.S. 218 (1973). It is undisputed that the drugs in respondent's apartment were in plain view and were first observed within 30 to 90 seconds after the police entered. (J. App. 18, 27-28) In *Robinson*, a criminal defendant argued that a traffic arrest had been a pretext to search for narcotics. This Court held that as long as there was probable cause to arrest and the arrest was normal police practice, the defendant's argument about a pretextual arrest could be disregarded. *Robinson*, 414 U.S. at 221 n. 1. In a case of serious domestic violence, Chicago Police Department policy requires an "immediate arrest." *Chicago Police Department Training Bulletin*, Vol. 29, no. 7 (May 9, 1988).[6]

Respondent also argues under agency law that Gale Fisher lacked apparent authority from respondent to allow entry into the apartment. (Resp. Br. 22-24) That argument is irrelevant because agency law has nothing to do with this case. Rather the question is whether under the Fourth Amendment the officers reasonably concluded that they had a valid consent to enter. However, Gale Fisher had lived in the apartment from December until July with respondent's consent and approval. During July she was in the apartment almost every day and many nights, also with respondent's consent and approval. Thus even under agency law it is likely that respondent had given her apparent authority to let people into the apartment. *American Society of Mechanical Engineers v. Hydrolevel Corporation*, 456 U.S. 556 (1982).

It is far more important that all the facts known to the officers on July 26, 1985 indicated that Gale Fisher had

---

[6] Respondent claims that under Ill. Rev. Stat., 1985, ch. 38, sec. 107-11 and 107-12, "the police could have obtained a summons signed by a judge or a notice to appear signed by a police officer issuing the notice to appear and mailed either of those documents to respondent commanding him to appear in court on a certain date and time." (Resp. Br. 27) However, under Chicago Police Department General Order No. 82-8 a summons should only be issued when the offense is a petty offense or a Class C misdemeanor and it may never be issued when there is a reasonable likelihood that the offense will continue or recur or that life or property will be endangered if the offender is not arrested.

authority to let them into the apartment where respondent had broken her jaw. Officers Entress and Gutierrez knew that Gale Fisher had a key to that apartment. They knew that most or all of her personal property was there. They knew that she referred to the residence as "our apartment." Any reasonable person would have concluded from this information that Gale Fisher lived in the apartment or at least had constant access to it and control over it. Any police officer performing his duty would have acted promptly under these circumstances to arrest the man who had just committed a serious act of domestic violence.[7] Since the officers acted reasonably, the arrest and search were lawful under the Fourth Amendment.

**B**

**If This Court Does Not Recognize Apparent Authority As An Exception To The Warrant Requirement, Where There Is No Police Misconduct And No Possibility Of Deterring Future Police Misconduct, Competent And Relevant Evidence Should Not Be Subjected To The Strictures Of the Judicially Created Rule Of Exclusion And The Good Faith Exception To The Exclusionary Rule Should Be Applied.**

(Reply to Respondent's Issue V
and to Issue II Raised by Amicus)

Respondent stands alone in asserting that "this Court has never announced any 'good faith exception to the exclusionary rule,' " (Resp. Br. 41) and boldly condemns commentators "who should know better." (Resp. Br. 42) *Amicus* admits however, as it must, that a "good faith" exception to the exclusionary rule does exist. *Illinois v. Krull*, 480 U.S. 340

---

[7] Although respondent argues that the officers had time to secure a warrant, it should be noted that the dissent in *Matlock* urged that the consent search in that case was unconstitutional because the police did not seek a warrant, even though there was time and opportunity to do so. 415 U.S. at 178-188 (Douglas, J. dissenting) The majority did not adopt such a principle. Since the officers here believed they were acting under a valid exception to the warrant requirement, they would not have interrupted their investigation and expended time to secure a warrant.



(1987); *United States v. Leon*, 468 U.S. 897 (1984). Nevertheless, it is claimed that this exception should apply only when a search is authorized by an invalid warrant or statute, and not when police officers reasonably believe the entry or search to be lawful.

This argument is contrary to the policy behind the exclusionary rule. The primary purpose of the exclusionary rule is to deter police misconduct. *United States v. Janis*, 428 U.S. 433, 446 (1976). When police officers conduct a search with what they reasonably believe is valid consent based on the objective facts and circumstances presented to them, there is no police misconduct and no possibility of deterrence. A secondary purpose of the exclusionary rule is to promote the integrity of the judicial system by excluding evidence unlawfully obtained by the police. *United States v. Peltier*, 422 U.S. 531, 536-540 (1975). However, the integrity of the judicial system would certainly not be promoted by the exclusion of relevant evidence which was obtained by what the police reasonably believed were lawful means.

While the presence of a neutral magistrate in *Leon* was a significant fact, petitioner submits it did not represent the underlying basis of the "good faith exception" to the exclusionary rule. The underlying rationale is clear: Competent and relevant evidence should not be subjected to the strictures of the judicially created rule of exclusion, where its deterrent purpose would not be served by this sanction. The main focus of the *Leon* decision was on the conduct of the police officers who acted in objective good faith reliance on the facts presented to them.

Respondent and *amicus* allege that to extend *Leon* and *Krull* and apply a reasonable good faith belief exception to the exclusionary rule in this case would, in essence, make police officers the judges of their own conduct. That assertion is patently false. While there is no magistrate or legislature present in this case prior to the search, the decisionmakers in reality are the courts, because the validity of a search based on consent is always subject to later review by the courts. Police officers could not simply claim that they reasonably believed they had a valid consent to search or enter, they

would have to prove that claim at a hearing on a motion to suppress evidence. Petitioner asks only that the police be given a chance to prove in court that they reasonably believed they had a valid consent before beginning a search.

*Amicus* argues that allowing an exception to the exclusionary rule here would encourage police misconduct by allowing officers to falsely claim that they reasonably believed that a search was based on a valid consent. However, judges routinely determine whether the police acted reasonably based on the information available to them. At a hearing on a motion to suppress evidence, the possibility of judicial error is no greater when the search was based on consent than it is when the search was incident to an arrest or authorized by a warrant. See *Franks v. Delaware*, 438 U.S. 154 (1978). Officers will know that their conduct in obtaining a consent to search can later be challenged in court.

There is simply no reason for this Court to deter the police from attempting to obtain consents to search. Searches based on consent are constitutionally valid and do not infringe on any legitimate expectation of privacy. *United States v. Matlock*, 415 U.S. 164 (1974). In fact in some ways searches with consent infringe on privacy rights to a lesser extent than other kinds of searches. In a consensual search, notice is given that a search will take place and someone having authority over the premises has an opportunity to decide whether to grant or refuse permission to search. Notice and an opportunity to refuse are not present in other kinds of searches. Application of the exclusionary rule in this case would, however, serve to chill the use of all consensual searches by law enforcement officers. (See Brief for the United States as Amicus Curiae Supporting Petitioner, pp. 14-15).

Respondent and *amicus* argue as if this Court was being urged to allow an exception to the exclusionary rule which would apply when officers acted with subjective good faith. That is just not so. Petitioner asks this Court to adopt, not a "subjective good faith" exception to the exclusionary rule, but rather an "objectively reasonable belief" exception. As this Court has said, " . . . the standard of reasonableness we adopt



is an objective one; the standard does not turn on the subjective good faith of individual officers." *Illinois v. Krull*, 480 U.S. 340, 355 (1987). The exclusionary rule should not apply when officers search with what they believe to be a valid consent and that belief is objectively reasonable on the basis of the information available to them. That standard will allow for effective judicial review of the actions of police officers.[8]

## II

## WHERE GALE FISHER REFERRED TO THE APARTMENT AT 3519 SOUTH CALIFORNIA AVENUE AS HER APARTMENT, RETAINED POSSESSION OF A KEY TO SUCH APARTMENT WHICH SHE TERMED HER KEY, AND KEPT ALL HER POSSESSIONS EXCEPT THREE BAGS OF CLOTHING AT THE APARTMENT, THE ILLINOIS APPELLATE COURT MISINTERPRETED *UNITED STATES v. MATLOCK* BY FINDING THAT GALE LACKED COMMON AUTHORITY TO PERMIT A CONSENSUAL ENTRY.

(Reply To Respondent's Issue I)

During the eight months before petitioner was arrested, Gale Fisher was in the apartment at 3519 South California almost every day with respondent's consent and approval. Nevertheless, respondent now argues that she lacked actual authority to permit entry into that apartment. Gale Fisher had that authority, however, from December, 1984 until July 26, 1985 since she shared that apartment with respondent.

---

[8] While amicus correctly notes that some federal courts have rejected the application of *Leon's* good faith exception to non-warrant searches, (See Brief for A-C at 22). Amicus fails to mention that there are federal courts which have applied the good faith exception to non-warrant searches. *United States v. Mourning*, 716 F.Supp. 279 (W.D. Tex. 1989), wherein the Court relied on *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc) and specifically applied the good faith exception to prevent exclusion of evidence seized in a warrantless consent search. See *United States v. Ortiz*, 714 F.Supp. 1569 (C.D. Cal. 1989).

Before July 1, 1985, Gale Fisher lived in the apartment with respondent, so there is no doubt that during that period she had actual authority to allow entry. After July 1, Gale Fisher never completely moved out. She left most of her possessions in the apartment and planned to return there after her child was toilet trained. (J. App. 40-41) She was in the apartment virtually every day and many nights, sometimes spending the entire night there. (J. App. 55, 73) Thus Gale Fisher never lost the access and control that gave her actual authority to allow entry to the apartment.[9]

Respondent argues that Gale Fisher was not his wife, nor was she the lessee of the apartment at 3519 South California. However, exactly the same situation existed in the *Matlock* case, in which this Court upheld a consent to search given by a woman who was neither the wife of the respondent nor the lessee of the apartment. *United States v. Matlock*, 415 U.S. 164 (1974). Therefore, as in *Matlock*, Gale Fisher had actual authority to give a valid consent to enter.

## III

## THIS COURT HAS JURISDICTION SINCE THE LOWER COURT DECISION WAS BASED SOLELY ON THE UNITED STATES CONSTITUTION, AND IN FACT NO COURT HAS EVER DECIDED THE ISSUE IN THIS MATTER IN A CASE ARISING UNDER THE CURRENT CONSTITUTION OF THE STATE OF ILLINOIS.

(Reply to Respondent's Issue II)

Respondent asserts that the lower court decided this case under the Illinois Constitution and this Court accordingly lacks jurisdiction. The opinion of the Appellate Court of Illinois clearly belies this allegation and affirmatively demonstrates that this case was decided solely under precedents from this and other courts applying the Fourth Amendment to the United States Constitution.

---

[9] The fact that the trial judge was unable to resolve the conflict in testimony regarding how Gale Fisher came to possess the key to the apartment, underscores the need for an apparent authority test.



The Illinois Appellate Court's opinion here did not cite any Illinois constitutional provision or statute, nor did it cite any case applying any Illinois constitutional provision or statute. In fact no court has ever decided a case under the current Illinois Constitution on the legality of a search performed with the permission of someone having apparent authority to consent. Since the Illinois Appellate Court decided this case solely under the Fourth Amendment, this Court has jurisdiction to review the matter. 28 U.S.C. § 1257(3).

Initially, petitioner would point out that respondent never mentioned the Illinois Constitution in either the trial court or the Appellate Court. In the trial court, respondent's motion to suppress evidence and his argument to the trial judge made no mention of the Illinois Constitution. (Trial Court Record 104-110, 124-129, 178) In the Illinois Appellate Court respondent cited the Fourth Amendment, three decisions of this Court and four other federal court decisions, but never mentioned any Illinois constitutional provision or statute. (Ill. App. Ct., Brief for Defendant-Appellee, pp. ii, 8) It is inappropriate for respondent to make an argument for the first time in this Court when he never made that argument in state court. *Illinois v. Gates*, 462 U.S. 213 (1983). Moreover, it is highly improbable that the Appellate Court of Illinois would have decided this case on grounds which were never raised by respondent or discussed by the lower court.

The opinion of the Appellate Court of Illinois unquestionably indicates that this case was decided by that court solely on federal constitutional grounds. The court cited only cases applying the Fourth Amendment and did not cite any case applying any Illinois constitutional provision or statute. The only precedent discussed at length by the Illinois Appellate Court, and the only case quoted in the opinion below, is this Court's opinion in *Matlock*. *United States v. Matlock*, 415 U.S. 164 (1974). It is true, as respondent points out, that *Matlock* did not resolve the precise issue in this case. 415 U.S. at 177 n. 14. However, the fact that the Illinois Appellate Court announced that it was guided by the *Matlock* decision and indeed quoted extensively from it, establishes that this

case was decided under the Fourth Amendment and not under any other provision.

The Appellate Court of Illinois also cited six Illinois precedents in its opinion, but all of those precedents are Fourth Amendment decisions. (J. App. 103) Each of those six precedents cites the Fourth Amendment, or key Fourth Amendment decisions of this Court, or both. *None* of those precedents cited by the Illinois Appellate Court so much as mentions the Illinois Constitution. Since all of the precedents relied upon by the Illinois Appellate Court were Fourth Amendment decisions, and since that court did not cite the Illinois Constitution or any case based on that constitution, it is clear that the lower court opinion here was based solely on the Fourth Amendment.[10]

Respondent seems to believe that if there are Illinois precedents on searches based on consent by persons with apparent authority, then those precedents must be based on independent state law grounds. That is just not so. The Illinois courts can and must enforce the United States Constitution. U.S. Const., Art. VI. When state courts decide federal constitutional issues, then this Court has jurisdiction to review those decisions. U.S. Const., Art. III, sec. 2; 28 U.S.C. § 1257(3). When considering the issue in this matter the Illinois courts have always relied on the Fourth Amendment and have never relied on the current Illinois Constitution. Therefore, this Court has jurisdiction to review the Fourth Amendment decision in this case.

Petitioner also asserts that the trial judge in this case, when granting the motion to suppress evidence, made his decision on state law grounds. That is not true and it would not matter even if it were true, since it is the decision of the

---

[10] Those six state precedents cited by the Illinois Appellate Court were *People v. Stacey*, 58 Ill. 2d 83, 317 N.E.2d 24 (1974); *People v. Vought*, 174 Ill. App. 3d 563, 528 N.E.2d 1095 (2d Dist. 1988); *People v. Callaway*, 167 Ill. App. 3d 872, 522 N.E.2d 337 (5th Dist. 1988); *People v Daugherty*, 161 Ill. App. 3d 394, 514 N.E.2d 228 (2d Dist. 1987); *People v. Posey*, 99 Ill. App. 3d 943, 426 N.E.2d 209 (5th Dist. 1981); *People v. Bochniak*, 93 Ill. App. 3d 575, 417 N.E.2d 722 (1st Dist. 1981).



Illinois Appellate Court which is being reviewed here. 28 U.S.C. sec. 1257(3). In his findings the trial judge did not mention the Illinois Constitution or any precedent based on the Illinois Constitution. But Judge Schreier did cite the *Miller* decision as "controlling," and *Miller* is explicitly based on the Fourth Amendment and does not cite any Illinois constitutional provision or statute. *People v. Miller*, 40 Ill. 2d 154, 238 N.E.2d 407 (1968). (J. App. 93)

In fact, respondent tacitly concedes that none of the recent Illinois decisions dealing with the issue in this case rely on any state constitutional provision. (Resp. Br. 18-19, n. 11) Respondent does, however, rely on the *Shambley* case from 1954 as establishing a rule based on the Illinois Constitution governing searches with consent from persons with apparent authority. *People v. Shambley*, 4 Ill. 2d 38, 122 N.E.2d 172 (1954) (partially overruled on other grounds, *People v. Nunn*, 59 Ill. 2d 344, 349, 304 N.E.2d 81 (1973)). *Shambley* does no such thing. For three reasons the *Shambley* decision has no application to this case: (1) it says nothing about searches authorized by a person with apparent authority to consent, (2) it was decided on the basis of an Illinois constitutional provision which was superceded 20 years ago, and (3) it was never cited or relied upon by any judge or litigant during proceedings in the Illinois courts in this case.[11]

This Court has held that respondent, in order to succeed with his independent and adequate state grounds argument, must show some "plain statement" by the lower court that it decided the case on the basis of state law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Respondent has not even attempted to meet his burden under *Long*. There is no statement in the opinion of the Appellate Court of Illinois, plain or otherwise, that it was deciding the case on the basis of the Illinois Constitution. On the contrary, that opinion does not refer to the Illinois Constitution or to any other provision of state law, nor does it cite any precedent decided on state law grounds. Therefore, under *Long* this Court " . . . will accept as

---

[11] See Ill. Const. 1970, Art. I, sec. 6; Ill. Const. 1870, Art. II, sec. 6

the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1041. *Accord: New York v. Class*, 475 U.S. 106, 109-110 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 326-328 (1985).

## CONCLUSION

For the reasons stated above and in their principal brief, petitioner respectfully requests that this Honorable Court reverse the judgment of the Appellate Court of Illinois, First District, and remand the matter to the Illinois courts for further proceedings.

Respectfully Submitted

NEIL F. HARTIGAN
Attorney General,
State of Illinois,
ROBERT J. RUIZ
Solicitor General
State of Illinois
JOSEPH CLAPS
First Assistant Attorney
General
TERENCE M. MADSEN*
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601
*Attorneys for Petitioner*

*Counsel of Record

CECIL A. PARTEE,
State's Attorney
County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
RENÉE GOLDFARB,
THEODORE FOTIOS BURTZOS,
PAUL GLIATTA,
KEVIN SWEENEY,
Assistant State's Attorneys,
*Of Counsel.*

(1)

No. 88-2018



# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

STATE OF ILLINOIS, PETITIONER

*v.*

EDWARD RODRIGUEZ

---

*ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

---

KENNETH W. STARR
*Solicitor General*
EDWARD S.G. DENNIS, JR.
*Assistant Attorney General*
WILLIAM C. BRYSON
*Deputy Solicitor General*
MICHAEL R. DREEBEN
*Assistant to the Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

27P

## QUESTION PRESENTED

The United States will address the following question:

Whether the warrantless entry of a dwelling is justified under the Fourth Amendment when law enforcement officers reasonably, but mistakenly, believe that the person who permits the entry has authority to do so.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page





Cases—Continued: Page



Constitution:



Miscellaneous:

# In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2018

STATE OF ILLINOIS, PETITIONER

*v.*

EDWARD RODRIGUEZ

*ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE UNITED STATES

This case presents the question whether the warrantless entry of a dwelling is justified under the Fourth Amendment when law enforcement officers reasonably, but mistakenly, believe that the person who permits the entry has authority to do so. Federal agents frequently undertake searches in reliance on the consent of persons who appear to have authority to consent to the search. Even though the agents may reasonably believe that the search was properly supported by consent, that belief sometimes turns out to be wrong in light of facts that subsequently emerge. Because the Court's decision will govern the admissibility of evidence gathered in such instances, the United States has a significant law enforcement interest in this case.

## STATEMENT

1. On July 26, 1985, at 2:30 p.m., Chicago, Illinois, police officers James Entress and Ricky Gutierrez went to a home at 3554 South Wolcott in Chicago in response to a call from another officer. At the home, the officers met Gail Fischer and her mother. Fischer had a black eye, bruises on her neck, and a swollen jaw. Fischer told the officers that earlier that day respondent had beaten her at their apartment at 3519 South California Street in Chicago. Fischer also said that respondent had for a time refused to let her leave the apartment. Entress asked Fischer whether she wished to sign a complaint against respondent. After briefly hesitating, Fischer said that she did. Fischer said that she believed respondent was sleeping at the apartment at the time and that she would let the officers in with her key to arrest him.[1] Pet. App. 2-3; R. 3-6, 10, 14, 16, 24, 33, 49-50, 84-85.

The officers accompanied Fischer to the apartment at 3519 South California. One officer secured the rear exits, while the other two went to the front door of the apartment with Fischer. Fischer used her key to let the officers into the apartment; she then returned to the police car. Officers Entress and Gutierrez walked through the living room of the apartment and found respondent sleeping in the bedroom. In the living room, the officers saw narcotics paraphernalia and an open Tupperware jar containing

[1] At the suppression hearing, Officer Entress testified that he asked Fischer whether respondent dealt in narcotics, as Entress had recalled hearing that a person with respondent's name was involved with narcotics. Fischer did not reply. Officer Entress testified that he then said that if Fischer was afraid "of us going into your apartment and locking him up," Fischer should say so and the officers would not go in. After thinking for a moment, Fischer said that she wanted to file a complaint and would open the door for the officers. Pet. App. 4; R. 24, 28.



white powder, which the officers believed was cocaine. In the bedroom, the officers saw two open attache cases containing clear plastic bags filled with white powder and a small amount of marijuana. The officers woke respondent and arrested him. Respondent said that he wanted to get money from a dresser drawer before leaving. In the drawer, the officers saw another clear packet containing white powder. Pet. App. 4-5; R. 13, 17-22, 29-32, 72.

2. Based on the narcotics and paraphernalia found at his apartment, respondent was charged with possession of cocaine with intent to distribute it, and possession of marijuana. Respondent moved to suppress the evidence found at the apartment on the ground that Fischer's consent was ineffective to justify the officers' entry. R. 165-167, 177-178.

a. At the suppression hearing, Officer Entress testified that he believed Fischer had authority to consent to the entry of the apartment, because he thought she lived there. Officer Entress recalled that Fischer said that "all her property was there and that she had been living there."[2] Officer Entress also testified that Fischer "kept using the word 'our' " to refer to the apartment at 3519 South California; at no time did she refer to it as respondent's apartment.[3] Officer Entress added that Fischer had said she had been beaten at the South California apartment. Finally, Officer Entress noted that Fischer had "stated that this

[2] Respondent's counsel sought to impeach Officer Entress with his testimony from the preliminary hearing, where he testified that Fischer had said she "used to" live at the South California apartment. Officer Entress indicated that his best recollection was that Fischer said "she had been living there." R. 11-12; Pet. App. 3. Neither of the courts below made findings regarding Fischer's exact words.

[3] Officer Entress's testimony that Fischer referred to the apartment as "our" apartment was corroborated by her mother. R. 54.

was her key," and that she had used the key to open the apartment door. R. 6, 10, 11, 16-17, 26-28.

Fischer and her mother testified that Fischer had moved into the apartment at 3519 South California with respondent in December 1984. On July 1, 1985, however, respondent had asked her to move out until Fischer's two-year-old child was toilet trained and weaned. With her mother's assistance, Fischer and her children had then moved to her mother's house, leaving her key to 3519 South California at the apartment. Fischer took her clothes with her, but she did not take her other possessions from the apartment; those included her furniture, her stove, her refrigerator, and her dishes. Fischer's mother anticipated that after "the baby was bottle broken and potty trained," Fischer would move back to the apartment. R. 40-46, 71-74.

Between July 1 and July 26, Fischer lived at her mother's house. She visited respondent at the South California Street apartment nearly every day and spent between three and five nights there. However, Fischer neither contributed to the July rent nor invited her friends to the apartment after moving out. Fischer testified that on July 26, after respondent had beaten her and locked her in the apartment, Fischer took the key, without respondent's knowledge, in order to let herself out. Pet. App. 6-8; R. 40-46, 71-74, 79.

b. The trial court granted respondent's motion to suppress. The court rejected the State's argument that the officers could lawfully enter the apartment if they had a reasonable belief that Fischer was authorized to permit them to enter. The court ruled that the State's argument was foreclosed by *People* v. *Miller*, 40 Ill. 2d 154, 238 N.E.2d 407, cert. denied, 393 U.S. 961 (1968), "which would not allow for police to act on the apparent authority of [a] person in allowing the search of an apartment." R. 139.



Applying the test set forth in *United States* v. *Matlock*, 415 U.S. 164 (1974), the trial court also concluded that Fischer did not have actual authority to consent to the entry. The court identified several "controlling factors." These included the fact that Fischer was "not a usual resident, let alone an exclusive resident" at the apartment, but was "a rather infrequent visitor or resident or guest or invitee." Moreover, Fischer was not on the lease, did not pay rent, had moved her clothes, and, "most importantly," had moved her children from the apartment. The court found the evidence about Fischer's possession of the key to be equivocal; Fischer testified at the suppression hearing that she had taken the key, but the court found that that evidence was "negated" by Fischer's testimony at the preliminary hearing that respondent gave the key to her. Balancing those factors, the court concluded that Fischer "did not have the right or control over that apartment to allow the police entry." R. 139-142.

3. The Appellate Court of Illinois, First Judicial District, affirmed. The court noted that even though this case involves a consent to enter rather than a consent to search, the same principles control, because "the validity of a warrantless seizure of evidence in plain view depends on the validity of the entry by the officers seizing the evidence." The court then held that the trial court had properly rejected the State's contention that Fischer's consent was sufficient to justify the entry, because governing Illinois precedents held that warrantless entries and searches may not be upheld on the ground that the consenting party had apparent authority to consent. Pet. App. 8-9 (citing *People* v. *Vought*, 174 Ill. App. 3d 563, 528 N.E.2d 1095 (1988), cert. denied, 109 S. Ct. 3228 (1989), and *People* v. *Bochniak*, 93 Ill. App. 3d 575, 417

N.E.2d 722 (1981), cert. denied, 455 U.S. 938 (1982)).[4]

The appellate court also upheld the trial court's conclusion that Fischer lacked authority to consent to the entry. Reviewing the factors that the trial court found to be controlling on that issue, the court agreed that Fischer "did not have the common authority over the defendant's apartment that was necessary to make her consent valid." Pet. App. 10, 12-14.

4. The Illinois Supreme Court denied a petition for review. Pet. 3.

## SUMMARY OF ARGUMENT

1. The Fourth Amendment requires that searches and seizures be reasonable. The question whether a particular law enforcement practice is reasonable is answered by balancing the competing governmental and private interests implicated by the practice. Because criminal investigations necessarily involve weighing and acting on probabilities, this Court has recognized that the law of search and seizure is founded upon the assessment of probabilities in light of the available facts.

Applying those principles, the Court has held that an intrusion that reasonably appears to be justified based on circumstances existing at the time is not rendered invalid because of facts that emerge later. Thus, in *Hill* v. *California*, 401 U.S. 797 (1971), the Court held that an arrest of the wrong person based on a reasonable mistake in

[4] Both *Vought* and *Bochniak* relied on the Illinois Supreme Court's decision in *People* v. *Miller*, 40 Ill. 2d at 159, 238 N.E.2d at 409, where that court applied the Fourth Amendment to suppress evidence found during the search of a guest's car parked in a homeowner's garage; the court held that the apparent authority of the homeowner to consent to the search of the car did not "waive" the guest's constitutional rights.



identity is not an "unreasonable" arrest. And in *Maryland* v. *Garrison*, 480 U.S. 79 (1987), the Court held that a warrant-authorized search of the wrong apartment based on a reasonable factual error about the place to be searched is not an "unreasonable" search.

2. The principles announced in *Hill* and *Garrison* control this case. Under those principles, a search based on consent is justified when it is supported by a reasonable, but mistaken, belief that a consenting party is authorized to consent to the search.

The consent search is a valuable tool of law enforcement that should not be undermined by rules that frustrate its utility. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229 (1973). Moreover, a search based on consent does not require an individual "waiver" of a person's Fourth Amendment rights; consent can validly be provided by a third party. *United States* v. *Matlock*, 415 U.S. 164 (1974).

Apparent authority to consent should be held sufficient for three reasons. First, a rule requiring a showing of apparent authority adequately restricts the discretion of law enforcement officers by requiring that they comply with objective, ascertainable rules. See *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). Subjective good faith is not enough; the officer's judgment as to the existence of apparent authority must be well founded. Second, retrospective invalidation of consent searches that appear reasonable at the time would impose substantial costs on all consent searches by deterring the police in many instances from acting on consents that appear (and are) perfectly valid. Third, a strict requirement of actual authority exceeds what is required to protect reasonable expectations of privacy. An individual's claim to be free from official invasion is qualified by the need to tolerate the kinds of errors based on reasonable but erroneous judgments that inevitably occur during routine police work.

3. Applying these principles, the entry of respondent's apartment satisfied the Fourth Amendment. The officers reasonably believed that Gail Fischer was authorized to consent to the entry. Fischer explained to the officers that she had been beaten by respondent at their apartment, and she said that she "had been living there." She also stated that all of her belongings were at the apartment. Significantly, she had a key to the apartment, which she told the officers she would use to let them in. Fischer accompanied the officers to the apartment, where she produced the key and used it to open the door. Under these circumstances, there was no objective reason for the officers to question her authority to permit them to enter. Consequently, the evidence found in plain view following the entry of the apartment should not have been suppressed.

## ARGUMENT

### THE OFFICERS' ENTRY INTO RESPONDENT'S APARTMENT, BASED ON AN APPARENTLY VALID CONSENT BY A THIRD PARTY, WAS LAWFUL

#### A. A Search That Reasonably Appears Valid At The Time Of The Intrusion Does Not Violate The Fourth Amendment, Even If The Factual Premise For The Search Is Subsequently Found To Be Mistaken

This Court has emphasized that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.' " *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979) (footnote omitted). The requirement of reasonableness in the exercise of discretion does not impose unrealistic restraints upon official conduct, but prohibits only "arbitrary and oppressive interference by enforcement officials." *United*



*States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976). In each case, the fundamental question is whether the intrusion is reasonable. *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985). It is well established that the reasonableness of a particular practice is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983) (quoting *Delaware* v. *Prouse*, 440 U.S. at 654); *Skinner* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. at 1414.

In a variety of contexts, this Court has made clear that the law of search and seizure is founded upon the assessment of probabilities in light of the available facts. The ascertainment of probable cause, for example, "as the very name implies, * * * deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949); *Illinois* v. *Gates*, 462 U.S. 213, 231-232 (1983). Likewise, the concept of reasonable suspicion "does not deal with hard certainties, but with probabilities." *United States* v. *Sokolow*, 109 S. Ct. 1581, 1585 (1989) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417 (1981)).

As in any decisionmaking process governed by probabilities, there will inevitably be instances of error. The prospect of error in the judgments made by law enforcement officials, however, does not invalidate an intrusion that reasonably appeared to be justified based on circumstances known to the officers at the time of the intrusion. See *Graham* v. *Connor*, 109 S. Ct. 1865, 1872 (1989). This principle underlies the fundamental rule that "[t]he validity of [an] arrest does not depend on whether the suspect

actually committed a crime; the mere fact that the suspect is later acquitted • • • is irrelevant to the validity of the arrest." *Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979); see *Gerstein* v. *Pugh*, 420 U.S. 103, 119-123 (1975).

In *Hill* v. *California*, 401 U.S. 797 (1971), the Court applied this principle in upholding an arrest based on mistaken identity. In that case, the police, supported by probable cause, went to Hill's apartment to arrest him. Finding a person fitting Hill's description, they arrested the person and searched the apartment. The arrestee, however, turned out not to be Hill. The Court held that the fact that the police mistakenly arrested the wrong person did not invalidate the subsequent search. The arrest of a person as a result of a reasonable mistake in identity, the Court stated, is still a "reasonable arrest." *Id.* at 802. "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." *Id.* at 804. Consequently, "[w]hen judged in accordance with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act, the arrest and subsequent search were reasonable and valid under the Fourth Amendment." *Id.* at 804-805 (citation omitted).

The Court applied the same principle in *Maryland* v. *Garrison*, 480 U.S. 79 (1987). There, the Court held that a search of the wrong apartment, based on a reasonable factual error in conducting a warrant-authorized search, did not violate the Fourth Amendment. The police had obtained a warrant for a suspect's "third floor apartment" and had executed it, reasonably believing that there was only one apartment on the third floor of the building described in the warrant. *Id.* at 80. After beginning the search and discovering narcotics, however, the officers



realized that the third floor was divided into two units and that they were in the wrong apartment. The Court held that the contraband that the officers found in that apartment was not gathered in violation of the Fourth Amendment. The Court first determined that the warrant was not invalid for lack of particularity in describing the "place to be searched," even though in retrospect it was apparent that the warrant was overbroad. The proper test, the Court stated, is to "judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted." *Id.* at 85.

Relying on *Hill*'s rationale, the Court in *Garrison* likewise held that the officers' execution of the warrant was reasonable. The Court recognized "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants," 480 U.S. at 87. In addition, the *Garrison* Court stated that the "objectively understandable and reasonable" mistake that put the officers in the wrong dwelling did not offend the principle of reasonableness that underlies the Fourth Amendment. *Id.* at 88.

### B. A Search Based On The Consent Of A Party Who Appears To Have Authority To Give Such Consent Is Valid If The Officers Reasonably Believe That The Consenting Party Has The Proper Authority

The principles announced in *Hill* and *Garrison* justify a consent search based on a reasonable, but mistaken, belief that the consenting party is authorized to permit the search. To begin with, it has long been recognized that the consent search is a valuable means for law enforcement officers to gather information. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). When a search is supported by consent, neither a warrant nor probable

cause is required. *Id.* at 219. Inasmuch as consent searches "are part of the standard investigatory techniques of law enforcement agencies," the Court has refused to constrain them by "artificial restrictions * * * [that] would jeopardize their basic validity." *Id.* at 229, 231-232.[5]

The Constitution does not require that an individual personally consent to the search of his property before a consent search can be valid. In *United States* v. *Matlock*, 415 U.S. 164 (1974), the Court held that police may conduct a warrantless search of a person's dwelling on the basis of the consent of a third party who has common authority over the dwelling. The Court explained that such consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7; see *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). *Matlock*, however, explicitly reserved the question whether, absent proof of actual authority, a search is nevertheless justified when "the searching officers reasonably believed that [the third party] had sufficient authority over the premises to consent to the search." 415 U.S. at 177 n.14.

In our view, the reasonable appearance of authority by a third party to consent to a search or an entry provides adequate grounds for the police to act. Several reasons support this view. First, an apparent authority rule

[5] In part to protect the usefulness of consent searches, *Schneckloth* held that a strict "voluntariness" standard, requiring a free and intelligent waiver of a known constitutional right, cf. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), does not apply to consent searches; instead, a totality-of-the-circumstances test governs the inquiry. 412 U.S. at 235-248.



satisfies the fundamental requirement that the discretion of law enforcement officers be cabined by objective, ascertainable rules. Under the rule we propose, a government agent must have a reasonable basis for believing that a person has authority to consent before acting on such consent. A "subjective good-faith belief" is not sufficient. *Hill*, 401 U.S. at 804. Rather, "the reasonableness standard * * * requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard.' " *Delaware* v. *Prouse*, 440 U.S. at 654. As in other Fourth Amendment settings, the question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham* v. *Connor*, 109 S. Ct. at 1872. The reasonableness of the officers' action "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.*

If the police act unreasonably in forming their views, and the consenting person is found to lack proper authority, the search or entry is not valid. To adopt the additional limitation that a search that appeared reasonable at the time must be declared "unreasonable" because of subsequently discovered facts would provide no additional restraint on the exercise of official discretion. A search that reasonably appears to be supported by consent is not "arbitrary" or "oppressive." *United States* v. *Martinez-Fuerte*, 428 U.S. at 554. Consequently, a strict actual authority limitation is not needed to serve the Fourth Amendment's purpose of confining the exercise of discretion by government officials within reasonable bounds. See *Delaware* v. *Prouse*, 440 U.S. at 654.[6]

[6] There is also no reason to believe that the deterrent purposes of the exclusionary rule would be served by applying it to consent

Second, a rule that requires courts to invalidate consent searches that appear reasonable at the time would not be limited in its effects to searches in which actual authority is ultimately found to be absent; it would impose substantial costs on all consent searches. Knowledge that an apparently valid consent can later be invalidated would deter officers from accepting many perfectly legitimate consents, for fear that the searches based on those consents might later be held unlawful and the officers subject to criticism, administrative action, or even damages. Compare *Anderson* v. *Creighton*, 483 U.S. 635 (1987). Police officers facing a seemingly reasonable invitation to search would have to detour from the pursuit of evidence in order to engage in a distracting side inquiry into the exact relationship of the consenting party to the premises to be searched. Moreover, there would be no practicable stopping point to any such investigation, since even a reasonably thorough inquiry might fail to reveal the consenting party's lack of authority.[7]

---

searches conducted in reasonable reliance on persons with apparent authority. See *United States* v. *Sledge*, 650 F.2d 1075, 1077 (9th Cir. 1981). However, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983). In our view, the Court should resolve the issue in this case by holding that no unconstitutional police practice has occurred, thereby obviating the need to consider whether the exclusionary rule should be applied in this context. Cf. *United States* v. *Leon*, 468 U.S. 897 (1984); *Illinois* v. *Krull*, 480 U.S. 340 (1987).

[7] As the Seventh Circuit has observed:

> Going beneath the surface of the information in hand * * * would make the outcome of the search depend on niceties of property or marital law far removed from the concerns of the Fourth Amendment. Consents would become untrustworthy unless the police spent additional time investigating the authority of the person who gave consent, which in a case like ours would require knowledge of Illinois domestic relations law and the living arrangements of the couple.

*United States* v. *Rodriguez*, 888 F.2d 519, 523 (1989).



Rejection of the apparent authority rule would thus impair a practice that is of great use to the efficient conduct of investigations. That result is at odds with the concern expressed in *Schneckloth*, 412 U.S. at 228, not to inhibit consent searches unduly. The impact would be felt not only by the police, but also by "the community [, which] has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Id.* at 243.[8]

Third, while a strict actual authority requirement would strongly protect privacy interests, we believe that the scope of that rule would exceed what is required to protect reasonable expectations of privacy. Cf. *California* v. *Greenwood*, 108 S. Ct. 1625, 1628 (1988) ("An expectation of privacy does not give rise to Fourth Amendment protection * * * unless society is prepared to accept that expectation as objectively reasonable."). We acknowledge, of course, the profound interests in privacy that surround an individual's home and the importance of the home in the

---

[8] A critic of the apparent authority rule concedes that the ultimate effect of requiring actual authority regardless of appearances would be that "[t]he only sensible guide for the police is that they should never rely on consent as the basis for a search unless they must. If they do search relying on consent, they should be prepared to meet a heavy burden of proof that consent was in fact meaningfully given. And even then, because of the difficulties of proof, they should expect to be told often that the search was not proper." Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47, 64 (1974).

hierarchy of values protected by the Fourth Amendment. See, *e.g.*, *Payton* v. *New York*, 445 U.S. 573 (1980); *Steagald* v. *United States*, 451 U.S. 204 (1981); *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984). Nevertheless, the Fourth Amendment was not designed to erect an absolute barrier against entry of a home by officials, or to guarantee error-free police work in making the decision to enter.[9] Its command is one of reasonableness, embodying a compromise between individual security and the legitimate aims of law enforcement. One aspect of this principle, as shown by *Hill* and *Garrison*, is that the police may lawfully act on plausible, reliable information, even though that information is subsequently shown to be wrong. To the extent that freedom from official invasion is safeguarded by the Fourth Amendment, that interest is qualified by the need for tolerance of reasonable mistakes in order to protect the ability of the police to discharge their mission.

In our view, the apparent authority standard properly accommodates competing interests by imposing an objective restraint on official conduct, measured by events facing the officers at the time.[10] The courts of appeals that

[9] Cf. *Brower* v. *County of Inyo*, 109 S. Ct. 1378, 1381 (1989) ("[T]he Fourth Amendment addresses 'misuse of power,' • • • not the accidental effects of otherwise lawful government conduct.").

[10] While we have described the rule as one of "apparent authority," following the usage of the courts of appeals, see, *e.g.*, *United States* v. *Rodriguez*, 888 F.2d at 523, the principles underlying the rule are entirely distinct from the apparent authority doctrine of agency law. See *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 565-566 (1982). In agency law, the apparent authority of an agent supports the imposition of liability upon a principal because the agent is in a position to "affect the legal relations of [the principal] by transactions with third persons." *Id.* at 566 n.5 (quoting Restatement (Second) of Agency, § 8 (1957)). In the consent search context, by contrast, the concept of "apparent authority" refers to the reasonable appearance of authority from the vantage point of the officials whose action is being judged. The application of the Fourth Amendment, which "is quintessentially a regulation of the police," Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 371 (1974), does not turn on concepts invoked in state agency law any more than it turns on state property or tort law. See *California* v. *Greenwood*, 108 S. Ct. at 1625; *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 232 (1986); *Matlock*, 415 U.S. at 171 n.7.



have addressed the issue have uniformly adopted that view,[11] as have the vast majority of state courts that have considered the matter.[12]

[11] See, *e.g.*, *United States* v. *Rodriguez*, 888 F.2d at 523 ("The question posed by the Fourth Amendment is whether the search is 'reasonable', and it is reasonable to act on the basis of apparently valid consent."); *United States* v. *Yarbrough*, 852 F.2d 1522 (9th Cir. 1985), cert. denied, 109 S. Ct. 171 (1988); *United States* v. *Miller*, 800 F.2d 129, 133 (7th Cir. 1986); *United States* v. *Hamilton*, 792 F.2d 837, 842 (9th Cir. 1986); *United States* v. *Sledge*, 650 F.2d 1075, 1080-1081 (9th Cir. 1981) (Kennedy, J.) ("[A] search is not invalid where a police officer in good faith relies on what reasonably, if mistakenly, appears to be a third party's authority to consent to the search."); *United States* v. *Isom*, 588 F.2d 858, 861 (2d Cir. 1978); cf. *United States* v. *Peterson*, 524 F.2d 167, 180-181 (4th Cir. 1975) ("At the very least, Mrs. Peterson possessed 'the necessary appearance of authority • • • ' to validate a search based on her consent.". Compare *Riley* v. *Gray*, 674 F.2d 522, 528 n.7 (6th Cir. 1982) (refusing to apply the doctrine based factually implausible claim).

[12] See, *e.g.*, *Nix* v. *State*, 621 P.2d 1347, 1349 (Alaska 1981) ("We now align ourselves with those authorities, representing the majority view, which hold that apparent authority alone is required."); *People* v. *Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877, cert. denied, 454 U.S. 854 (1981); 3 W. LaFave, *Search and Seizure*, § 8.3(g), 262-263 n.98 (2d ed. 1987 & Supp. 1989) (collecting cases). See also Model Code of Pre-Arraignment Procedure, § 240.2(1)(c), at 148-149 (1975) ("[t]he consent justifying a search • • • must be given, in the case • • • of (c) search of premises, by a person who by ownership or otherwise, is apparently entitled to determine the giving or withholding of consent."). But see *People* v. *Miller*, *supra*; *State* v. *Carsey*, 59 Or. App. 225, 650 P.2d 987, aff'd, 295 Or. 32, 664 P.2d 1085 (1982).

The apparent authority rule is fully consistent with this Court's decisions in *Stoner* v. *California*, 376 U.S. 483 (1964), and *Chapman* v. *United States*, 365 U.S. 610 (1961). In *Stoner*, the Court held that the police officers' reliance on the authority of a hotel desk clerk to admit them to an absent guest's room was insufficient because "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' " 376 U.S. at 488.[13] In *Chapman*, the Court held that a search was not valid when a landlord, smelling an "odor of mash" at his tenant's house, called the local police officers and told them they could go inside. 365 U.S. at 611.

*Stoner* and *Chapman* simply underscore that the police may not rely on persons who plainly lack the indicia of authority to permit the search or entry in question. In neither *Stoner* nor *Chapman* were the police misled about the relationship between the consenting party and the premises to be searched. The police simply accepted consents from persons who could not reasonably be thought to have authority to consent.[14] That factor distinguishes

[13] *Stoner* also stated that only the guest could "waive" his rights with regard to the search, "either directly or through an agent." 376 U.S. at 489. That language does not address the issue in this case. The concept of "waiver" is not the source of authority for a consent search based on the actual authority of a third party, cf. *Schneckloth* v. *Bustamonte*, 412 U.S. at 245 ("a 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions that have approved 'third party consents' "), and it has no relevance to a search justified by a third party's apparent authority. The justification for such a search is the reasonableness of police action based on the information the police have before them.

[14] As one commentator has recognized, in *Stoner* "the police were in no sense mistaken as to the essential facts, namely that the consenting party was only the clerk and that the room was currently rented by the defendant. • • • That is, *Stoner* involved a mistake of law rather than a mistake of fact, which does not come within the apparent authority doctrine." 3 W. LaFave, *Search and Seizure*, § 8.3(g), at 262 & n.96 (2d ed. 1987).



those decisions from cases in which the police make a reasonable mistake of fact about a third party's apparent authority.[15]

### C. Under The Foregoing Standards, The Entry Into Respondent's Apartment Was Lawful

The officers who entered respondent's apartment reasonably believed that Gail Fischer was authorized to consent to the entry. As we previously described more fully, Fischer explained to the officers that she had been beaten by respondent at their apartment, and she stated that she had been living there. Fischer repeatedly referred to the apartment as being "ours," and mentioned that all of her belongings were there. Significantly, Fischer had the key to the apartment, which she used to open the door.

These facts were sufficient to justify the officers' conclusion that Fischer had the authority to consent to their entry into the apartment. The situation presented itself to the police as an unfortunate, but routine, domestic dispute; the police accepted the victim's consent to give them access to "her" apartment. There was no reason for the officers to doubt the validity of that consent. Even if the officers had spontaneously probed to discover from Fischer the details of her recent living arrangements, it is far from clear that they would have been able to discover that Fischer lacked the requisite authority to permit the

[15] The Ninth Circuit, which has taken the lead in developing the apparent authority doctrine, has had no difficulty in finding a lack of justification for searches authorized by landlords, *United States* v. *Warner*, 843 F.2d 401, 403 (1988), or hotel managers, *United States* v. *Winsor*, 846 F.2d 1569, 1571 (1988) (en banc), on appropriate facts.

entry.[16] Accordingly, the evidence found in plain view following the entry of the apartment should not have been suppressed.[17]

---

[16] The State has urged in its petition (Pet. 27-31) that the appellate court erred in its application of *Matlock* to the facts of this case. There is substantial force to that argument. Compare *United States* v. *Trzaska*, 859 F.2d 1118, 1120 (2d Cir. 1988) (consent was validly given by estranged wife who had only recently moved out, still retained a key to the residence, and still had her personal belongings there), cert. denied, 110 S. Ct. 123 (1989); *United States* v. *Guzman*, 852 F.2d 1117, 1121-1122 (9th Cir. 1988) (consent was validly given by wife whose name was on lease and who sometimes resided at the defendant's apartment and had a key); *United States* v. *Crouthers*, 669 F.2d 635, 642-643 (10th Cir. 1982) (consent was validly given by wife who had moved in with parents but retained key to apartment and had not abandoned marriage). Regardless of whether the courts below erred in their application of *Matlock* (a question that we do not believe need be reached), the closeness of the question strengthens the case for concluding that the officers acted reasonably in reaching their on-the-spot judgment that Fischer's consent was adequate.

[17] Because the Illinois courts have not passed on the application of apparent authority principles to the facts of this case, the Court may wish to remand the case for initial consideration of that issue by those courts. Cf. *United States* v. *Matlock*, 415 U.S. at 177-178.



## CONCLUSION

The judgment of the Appellate Court of Illinois, First Judicial District, should be reversed.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

EDWARD S.G. DENNIS, JR.
*Assistant Attorney General*

WILLIAM C. BRYSON
*Deputy Solicitor General*

MICHAEL R. DREEBEN
*Assistant to the Solicitor General*

DECEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00669

(5)



No. 88-2018

In The
Supreme Court of the United States
October Term, 1989

STATE OF ILLINOIS,
*Petitioner,*
*--against--*
EDWARD RODRIGUEZ,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT
OF THE STATE OF ILLINOIS

# BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LINCOLN LEGAL FOUNDATION, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., THE NATIONAL SHERIFFS' ASSOCIATION, INC., THE CHICAGO CRIME COMMISSION, AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF THE RESPONDENT.

*(List of Counsel on Inside Front Cover)*

OF COUNSEL:
GREGORY U. EVANS, ESQ.
General Counsel
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

DANIEL B. HALES, ESQ.
PETERSON, ROSS, SCHLOERB
AND SEIDEL
President,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60656

GEORGE D. WEBSTER, ESQ.
International Association of
Chiefs of Police, Inc.
1110 N. Glebe Road
Suite 200
Arlington, Virginia 22201

JOHN JEMILO, ESQ.
Executive Director,
Chicago Crime Commission
79 W. Monroe Street, #605
Chicago, Illinois 60603

JOSEPH A. MORRIS, ESQ.
President and General Counsel
The Lincoln Legal Foundation
100 West Monroe Street
Chicago, Illinois 60603

JACK E. YELVERTON, ESQ.
Executive Director,
National District Attorneys
Association, Inc.
1033 N. Fairfax Street
Alexandria, Virginia 22314

*Counsel for Amici Curiae*

FRED E. INBAU, ESQ.
John Henry Wigmore Professor
of Law, Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director,
BERNARD J. FARBER, ESQ.
Associate Counsel,
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland
Avenue, #1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Glen Ellyn, Illinois 60137
Tel: (708) 858-6392

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES



**No. 88-2018**

**In The**
# Supreme Court of the United States
**October Term, 1989**

**STATE OF ILLINOIS,**
*Petitioner,*
*--against--*

**EDWARD RODRIGUEZ,**
*Respondent.*

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT
OF THE STATE OF ILLINOIS

**BRIEF AMICI CURIAE**
**OF**
**AMERICANS FOR**
**EFFECTIVE LAW ENFORCEMENT, INC.,**
**JOINED**
**BY**
**THE INTERNATIONAL ASSOCIATION OF**
**CHIEFS OF POLICE, INC.,**
**THE LINCOLN LEGAL FOUNDATION,**
**THE NATIONAL DISTRICT**
**ATTORNEYS ASSOCIATION, INC.,**
**THE NATIONAL SHERIFFS' ASSOCIATION, INC.,**
**THE CHICAGO CRIME COMMISSION, AND**
**THE ILLINOIS ASSOCIATION OF**
**CHIEFS OF POLICE,**
**IN SUPPORT OF THE PETITIONER**

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner and the Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court, as required by the Rules.

## INTEREST OF AMICI

**Americans for Effective Law Enforcement, Inc. (AELE),** as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

**AELE** has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States, and thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

**The International Association of Chiefs of Police, Inc. (IACP),** is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

**The Lincoln Legal Foundation (LLF),** is a national, nonprofit, nonpartisan, public-interest law center which undertakes litigation, administrative proceedings, legal studies, and educational activities in matters promoting political, economic, and civil liberties; preserving



constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

**The National District Attorneys Association, Inc. (NDAA),** is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

**The National Sheriffs' Association Inc. (NSA),** is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

**The Chicago Crime Commission (CCC),** is a not-for-profit Illinois corporation that has provided, since 1919, an independent oversight of the criminal justice system in the Chicago metropolitan area. It is composed of prestigious members of the business, professional and legal community, whose purpose is the improvement of the system and a better understanding of its workings by law-abiding citizens.

**The Illinois Association of Chiefs of Police** represents law enforcement executives and administrators in the State of Illinois. It actively engages in training programs and publications for Illinois law enforcement officers, as well as *amicus curiae* advocacy in cases critical to law

enforcement interests in the State.



## ARGUMENT

### A POLICE OFFICER'S GOOD FAITH RELIANCE ON A THIRD PARTY'S APPARENT AUTHORITY TO PERMIT A CONSENSUAL ENTRY CONSTITUTES A VALID EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

*Amici* are professional organizations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of obtaining and executing arrest and search warrants, making warrantless arrests and searches, including plain view seizures, conducting interrogations, and investigating reports of crimes on and off premises; (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby; and (3) members of the business and professional communities devoted to the goal of effective law enforcement.

Because of the relationship with our members, and the composition of our membership and directors--including active law enforcement administrators and counsel at the state and national level--we possess direct knowledge of the impact of the ruling of the court below, and we wish to transmit that knowledge to this Court.

*Amici* will not discuss at length the case law analysis of the Petitioner State of Illinois in this case, although we agree with that analysis. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators and concerned members of Society to ensure that law enforcement officers have

sufficient guidance in the area of Fourth Amendment jurisprudence.

*Amici*, with our close involvement in the police community, know that police officers enter private homes for a variety of lawful reasons--e.g., to serve a warrant, to answer a call of distress, to take a routine report, or to render another service. Often they are confronted with situations similar to that presented in the instant case of a complainant who asserts authority to consent to enter premises, and the sighting of contraband or evidence in plain view, and must make decisions concerning the legality of the entry and seizure of evidence.

Police officers were told by the Respondent's (hereinafter called "defendant") wife that she had been living in the defendant's apartment, that her clothes and furniture were in the apartment, that the defendant was asleep there, and that she had a key to the apartment and would let the police into the apartment to arrest the defendant for beating her. The defendant's wife opened the apartment door and let the officers in. When they entered, they saw contraband drugs in plain view and seized it.

The court below, in an unpublished opinion, held that the wife's consent to enter was invalid under the third party consent rule of *United States v. Matlock*, 415 U.S. 164 (1974). *Amici* submit that the Illinois court was in error in its interpretation of *Matlock* and the underlying principles involved.

## I. UNDER UNITED STATES v. MATLOCK THE CONSENT WAS VALID.

In *Matlock* this Court ruled that a consent to search property granted by one with "common authority over or



other significant relationship to the premises or effects sought to be inspected," 415 U.S. at 171, is a valid exception to the Fourth Amendment warrant requirement. The Court defined "common authority" for purposes of the rule thusly at 415 U.S. at 171, n. 7:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property • • • but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, *so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.* (emphasis added).

*Amici* submit that the court below misconstrued *Matlock* as requiring actual authority in every case rather than merely apparent authority (the *Matlock* Court found it unnecessary to reach the apparent authority issue when it concluded that the court below had erroneously excluded evidence of actual authority). Although this Court has not ruled directly on the apparent authority issue, many lower courts have adopted and applied the apparent authority doctrine. *E.g., United States v. Sledge*, 650 F.2d 1075 (9th Cir. 1981); *United States v. Isom*, 588 F.2d 858 (2d Cir. 1978); *Nix v. State*, 621 P.2d 1347 (Alaska 1981); *State v. Lucero*, 143 Ariz. 108 (1984); *State v. Girdler*, 138 Ariz. 482 (1983); *Spears v. State*, 270 Ark. 331 (1980); *People v. Berow*, 688 P.2d 1123 (Colo. 1984); *Flanagan v. State*, 440 So. 2d 13 (Fla. App. 1983); *People v. Adams*, 53 N.Y.2d 1 (1981); *State v. No Heart*,

353 N.W.2d 43 (S.D. 1984). The apparent authority doctrine as applicable to a consent search of premises is also recognized in the Model Code of Pre-Arraignment Procedure, Sec. SS240.2 (1975) ("a person who by ownership or otherwise, is apparently entitled to determine the giving or withholding of consent").

The record below amply supports the conclusion that the police were dealing with a person (defendant's wife) who had apparent authority to consent to their entry of defendant's apartment.

*Amici* submit that using the apparent authority test, which is firmly established in the courts, the police belief that defendant's wife had "common authority" over the premises was well-grounded.

## II. THE POLICE CONDUCT IN THIS CASE WAS OBJECTIVELY REASONABLE.

This Court has for many years taken the position that the guiding purpose--indeed the central rationale--for the Fourth Amendment exclusionary rule is the deterrence of police misconduct, and that without deterrence the rule is not applicable. *United States v. Leon,* 468 U.S. 897 (1984); *Stone v. Powell,* 428 U.S. 465 (1976); *United States v. Peltier,* 414 U.S. 338 (1975); *United States v. Calandra,* 414 U.S. 338 (1974); *Michigan v. Tucker,* 417 U.S. 433 (1974). Indeed, the Court reiterated in *Leon,* 468 U.S. at 908, that "'as with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.'"

*Amici* realize that this Court has yet to squarely hold that the good faith exception to the exclusionary rule adopted in *Leon* is to be applied broadly in warrantless search cases, although the Court indicated favor for such



an extension in *Illinois v. Krull,* 480 U.S. 340 (1987) (warrantless search conducted under a statute later determined to be unconstitutional was upheld).

A clear-cut extension of this nature is appropriate in view of the underlying rationale for the good faith doctrine. Even those who would oppose such an extension on policy grounds recognize that it is entirely appropriate under the *Leon* rationale, including the respected commentator Professor Wayne LaFave:

> [M]uch of the reasoning in *Leon* will offer support for such an extension of that case beyond the with-warrant situation. Particularly noteworthy is the *Leon* majority's broad assertion that whenever the police officer's conduct was objectively reasonable the deterrence function of the exclusionary rule is not served and that "when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."

2 LaFave, *Search and Seizure,* (2nd Ed., 1987), Sec. 1.3(g), p. 77.

Even before the formulation of the good faith exception in *Leon,* its guiding rationale was urged in the context of consent searches:

> When the police are engaged in the difficult and sometimes dangerous business of solving crime, actions which they take in a good faith attempt to do their job should not be reviewed by courts against a holier-than-

thou standard of exceedingly technical complexity which the police officers cannot realistically be expected to administer. In other words, judicial determinations of the "reasonableness" of third party consent searches cannot properly ignore the circumstances of the search *as they appeared to the police* at the time the decision to search was made. Specifically, if the police obtain consent to search a house from someone who reasonably appears to them to be in control of the premises and in a position to authorize them to enter, it would be of little social utility for a court subsequently to rebuke the officers by excluding the evidence they obtained during the search on the ground that the person whose consent they accepted in good faith was the "general householder" rather than the "exclusive possessor."

> Reinforcing this line of reasoning is the consideration that the fourth amendment exclusionary rule rests upon a "police misconduct" rationale: that is, unlawfully seized evidence is excluded from trials in order to deter the police from engaging in unlawful conduct. If this deterrent effect exists at all, it quite clearly is of no effect when the police, believing that they are acting lawfully, conduct a search which later turns out to be "unlawful" because they failed to observe a subtle distinction drawn by a defense attorney with 20/20 hindsight.

Comment, 53 B.U.L. Rev. 1087, 1110 (1973).

The facts of this case clearly indicate, *amici* submit, that the officers possessed information that would lead a



reasonable police officer to conclude that there was a valid consent to enter the defendant's apartment. Extension of the good faith exception to warrantless searches generally, and this seizure in particular, would advance the rationale for the exclusionary rule delineated in *Leon* and give the police further bright-line guidance similar to that argued for successfully by *amici* in *New York v. Belton*, 453 U.S. 454 (1981), and other cases since then.

## III. EXTENSION OF THE GOOD FAITH EXCEPTION TO WARRANTLESS CASES WILL POSE NO BURDEN FOR THE COURTS, AND WILL GIVE BRIGHT LINE GUIDANCE TO THE POLICE.

Extension of the good faith exception to warrantless search and seizure cases would, we submit, be uncomplicated for the courts to apply. For example, the constitutional status of a consent could be objectively established without probing subjective elements of a police officer's belief. The need for assessing the credibility of the officer on subjective issues would thus be unnecessary. Such a rule would not only provide guidance but would also streamline the task of suppression hearing courts and the appellate courts. This, too, was recognized by Professor LaFave as a natural result of any extension of the *Leon* doctrine. He states:

> *Leon* takes the view that the "objectively reasonable belief" requirement is a purely objective one, so that there is no need for a court to engage in the particularly difficult speculation of what was actually going on in the mind of the searching or arresting officer. Rather, the inquiry is limited to what "a reasonably well-trained officer would have

> known," and certainly the same limitation ought to obtain if *Leon* were extended to without warrant cases.

2 LaFave, *Search and Seizure*, (2nd Ed., 1987), Sec. 1.3(g) p. 78.

Indeed, this Court has recently recognized the facility with which the objective reasonableness test can be applied even to difficult Fourth Amendment questions such as the constitutional propriety of the use of force by police officers, and has rejected the examination of the subjective element. *Graham v. Connor*, 109 S. Ct. 1865 (1989) (objective reasonableness test applied to Fourth Amendment seizure of a person subjected to investigative detention; officers' "evil intent" irrelevant).

Law enforcement administrators are charged with the duty of adopting and implementing policies and procedures that protect not only the constitutional rights of citizens during the performance of law enforcement functions, but also give law enforcement officers adequate guidance. To that end, law enforcement agencies should be encouraged to adopt and implement professional standards and policies that incorporate these concerns. *Amici*, as professional organizations, encourage the adoption of such model standards and policies for their respective constituencies. We submit that a clear pronouncement by this Court extending the good faith exclusionary rule exception to warrantless search and seizure cases will greatly encourage the promulgation of law enforcement practices and policies that will not only protect the constitutional rights of our citizens, but will also *give adequate guidance to the police.*



## CONCLUSION

**AMICI RESPECTFULLY REQUEST THIS COURT TO REVERSE THE DECISION OF THE COURT BELOW ON THE BASIS OF LAW AND EQUITY BY HOLDING THAT THE CONSENT INVOLVED IN THIS CASE WAS VALID UNDER UNITED STATES v. MATLOCK, OR, IN THE ALTERNATIVE, THAT THE OFFICERS' CONDUCT WAS OBJECTIVELY REASONABLE AND SHOULD NOT LEAD TO THE SUPPRESSION OF THE EVIDENCE.**

Respectfully submitted,

*(List of Counsel on Next Page)*

OF COUNSEL:
GREGORY U. EVANS, ESQ.
General Counsel
National Sheriffs' Association
1450 Duke Street
Alexandria, Virginia 22314

DANIEL B. HALES, ESQ.
PETERSON, ROSS, SCHLOERB
AND SEIDEL
President,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60656

JOHN JEMILO, ESQ.
Executive Director,
Chicago Crime Commission
79 W. Monroe Street, #605
Chicago, Illinois 60603

JOSEPH A. MORRIS, ESQ.
President and General Counsel
The Lincoln Legal Foundation
100 West Monroe Street
Chicago, Illinois 60603

GEORGE D. WEBSTER, ESQ.
International Association of
Chiefs of Police, Inc.
1110 N. Glebe Road
Suite 200
Arlington, Virginia 22201

JACK E. YELVERTON, ESQ.
Executive Director,
National District Attorneys
Association, Inc.
1033 N. Fairfax Street
Alexandria, Virginia 22314

## *Counsel for Amici Curiae*

FRED E. INBAU, ESQ.
John Henry Wigmore Professor
of Law, Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director,
BERNARD J. FARBER, ESQ.
Associate Counsel,
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland
Avenue, #1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.
Counsel of Record
421 Ridgewood Avenue
Glen Ellyn, Illinois 60137
Tel: (708) 858-6392

# AMICUS CURIAE

# BRIEF

CASE NO: 88-2018

(9)



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

---

## BRIEF OF AMICUS CURIAE, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

---

COUNSEL FOR AMICUS CURIAE

BENJAMIN S. WAXMAN,
JEFFREY S. WEINER,
First Vice President,
National Association of Criminal
Defense Lawyers,
Weiner, Robbins, Tunkey & Ross,P.A.
2250 Southwest Third Avenue,
Miami, Florida 33129
(305) 858-9550

30 pp

## TABLE OF CONTENTS

## TABLE OF CITATIONS

**TABLE OF CITATIONS (Continued)**

## TABLE OF CITATIONS (Continued)

## INTEREST OF AMICUS CURIAE

Amicus Curiae, The National Association of Criminal Defense Lawyers, is a national bar organization with membership exceeding 23,000 lawyers dedicated exclusively to criminal law matters. Its members practice in virtually every state and federal court in this country. They meticulously study and analyze police procedure on a daily basis. The organization is dedicated to the protection and preservation of the Bill of Rights. It is most concerned with any judicial decision that might further limit the protections of the fourth amendment.

The position taken by the State of Illinois in the instant case threatens to carve away another substantial piece of the fourth amendment and to substantially diminish the privacy and security rights of the people against our government. Until now, this Court has limited the ability of

police to search based on consent to instances where someone with actual authority has voluntarily consented to the search. Similarly, it has limited application of the exclusionary rule's good faith exception to searches based on warrants. A decision adopting the State of Illinois' position would dangerously extend the good-faith exception to warrantless searches. It would dramatically change police investigative procedures and severely undermine the protections of the fourth amendment. For these reasons, Amicus Curiae is committed to doing everything within its power to persuade this Court to reject the arguments of the Petitioner.

## SUMMARY OF THE ARGUMENT

It is apodictic that warrantless searches and seizures are per se unreasonable subject only to a few specifically established and well-

delineated exceptions. Search pursuant to consent is one such exception. However, the sine qua non of a valid consent search, whether authorized by a person against whom the government seeks to uncover evidence or a third-party, is the actual, voluntary consent of a person with a reasonable expectation of privacy in the area to be searched.

Searches based upon the consent of persons having only "apparent authority" necessarily lack the authorization of a person whose privacy interest is protected by the fourth amendment. From the perspective of the person whose privacy interest is being invaded, the search has no justification whatsoever. It cuts at the very heart of the fourth amendment.

Adhering to an actual authority requirement would be consistent with this Court's prior decisions. Additionally, adopting an apparent authority doctrine

would have a deleterious effect on police practice and the administration of justice. It would put a premium on police ignorance and would discourage diligent investigation to determine the existence of true authority to consent. It would undermine the fourth amendment's preference for searches pursuant to warrant. It would severely compromise the privacy interests of all persons in their homes.

Nor should this Court except the fruits of a search or seizure pursuant to the consent of a person having only apparent authority from the fourth amendment exclusionary rule based on the good faith exception. The two primary components of the rationale underlying the good faith exception are the fourth amendment's preference for the warrant process and a belief that the societal cost of suppression should only be imposed where the exclusionary rule's deterrence purpose

is served. In cases involving searches based on the consent of persons having only apparent authority, police have necessarily disregarded the fourth amendment's preference for the warrant process. Furthermore, suppression under these circumstances will certainly deter police from conducting illegal searches and seizures that are neither based on a warrant, probable cause and exigency, nor the consent of a person with an actual privacy or security interest in the place, thing, or person to be searched or seized.

## ARGUMENT

### I.

### THE FOURTH AMENDMENT PROHIBITS SEARCHES AND SEIZURES BASED ON THE APPARENT AUTHORITY OF A THIRD-PARTY WHERE ACTUAL AUTHORITY IS LACKING.

The fourth amendment to the United States Constitution protects in clear and

unequivocal language "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .." Contrary to the Petitioner's argument, however, "reasonableness" cannot be determined in a vacuum. It must be interpreted with reference to the fourth amendment's next clause which prohibits the issuance of warrants "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." See United States v. United States District Court, 407 U.S. 297, 315 (1972). Indeed, the warrant requirement is the "very heart of the Fourth Amendment." Id. at 316.

Consistent with this analysis, one of the most venerable principles of fourth amendment law is that warrantless searches and seizures "are per se unreasonable . . .

subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). These exceptions are "jealously and carefully drawn" and the burden is upon the sovereign to demonstrate the applicability of the exception upon which it relies. Coolidge v. New Hampshire, 403 U.S. 443, 355 (1971) (citations omitted). Thus, the manifest preference of the fourth amendment is for searches pursuant to warrants.

Search pursuant to consent is one exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Until now, the sine qua non of a valid consent search, as interpreted by this Court, has been the authorization, in fact, of a person whose targeted privacy interest is protected by the fourth amendment. See Schneckloth at 227, 248. This essential requirement follows readily

from this Court's recognition that the "[f]ourth amendment protects people, not places." Katz, 389 U.S. 347 at 356. If the person whose privacy interest is protected by the fourth amendment voluntarily consents to the sovereign's intrusion thereby waiving the protection of the fourth amendment, no additional authorization is required to justify the search.

Similarly, third-party consent, consent by persons who enjoy joint use of, access to, or control over the area to be searched but against whom the search is not intended to produce evidence, is wholly consistent with the fourth amendment. As with traditional consent searches, authority for these searches is given by persons whose privacy or security interests in the targeted area are protected by the fourth amendment. See United States v. Matlock, 415 U.S. 164, 171 and n.7 (1974);

Stoner v. California, 376 U.S. 483, 488-89 (1964); Chapman v. United States, 365 U.S. 610 (1961). To the extent that the person against whom the evidence is to be used might not have consented to the search, it is reasoned that this person assumed the risk that the consenting third-person might authorize the governmental intrusion. Id.

The notion of a search based on the consent of someone with only "apparent authority" necessarily means that this essential authority of a person whose privacy interest is protected by the fourth amendment, is missing. There has been no determination by a neutral and detached magistrate that probable cause exists to justify invasion of the targeted privacy interest. A person whose privacy interests are at stake has not assented to the search and waived the protection of the fourth amendment. Instead, a person who may have no actual concern for or interest in the

privacy of the person against whom the search is directed has authorized the search. Indeed, the individual purporting to give consent, as the instant case vividly demonstrates, may have interests antagonistic to the person whose privacy rights are being compromised. See United States ex rel. Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970). No matter how real this person's authority to consent may appear, from the perspective of the person whose fourth amendment rights are about to be trampled, no authorization justifying the search has been obtained.

Although this Court specifically reserved the question of apparent authority in United States v. Matlock, 415 U.S. 164, 177 n.14 (1974), several of this Court's prior decisions indicate that such searches would violate the fourth amendment. In Chapman v. United States, 365 U.S. 610 (1961), this Court held that the consent of

a landlord was insufficient to authorize the search of a tenant's rented premises. Although the landlord had not only apparent authority, but may well have had actual authority under state law to enter the premises that was searched, id. at 616, this Court held that "to uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" Id. at 617 (citation omitted).

In Stoner v. California, 376 U.S. 483 (1964), this Court addressed the issue of whether a hotel clerk could consent to the search of a hotel room rented to the defendant. In support of the search, the state argued that the clerk had authority under California law to permit entry of his guests' rooms and that "the search was reasonable because the police, relying upon

the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search." Id. at 488. In response, this Court stated: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" Id.[1]

For the reasons intimated by the decisions of this Court and others, the Illinois courts, e.g., People v. Vought, 174 Ill. App. 3d 563, 528 N.E.2d 1095, 1099-1100 (1988); People v. Bochniak, 93 Ill. App. 3d 575, 577, 417 N.E. 2d 722, 724 (1981), as well as courts in several other jurisdictions have firmly rejected the

---

[1] Were this Court to adopt an apparent authority doctrine, persons whom this Court has previously held could not consent to a search due to lack of actual authority, see Stoner (hotel clerk); Chapman (landlord), would now be entitled to give consent.

apparent authority doctrine. E.g., Farmer v. State, 759 P.2d 1031, 1032 (Okl. Cr. 1988); State v. Carsey, 664 P.2d 1085, 1093-95 (Or. 1983); cf. United States v. Elrod, 441 F.2d 353, 356 (5th Cir. 1971)(rejecting government's argument that officer's reasonable belief in voluntariness of consent by mental incompetent justified search). The court in Vought drew support for its decision from this Court's decisions in United States v. Leon, 468 U.S. 897 (1984) and Payton v. New York, 445 U.S. 573 (1980). The court noted that the rule of Payton was intended to deter police officers from making warrantless entries into homes absent exigent circumstances. Id. 528 N.E. 2d at 1100. It further reasoned that applying the exclusionary rule will deter police officers from choosing to conduct a warrantless search absent exigent circumstances compelling this decision. Id.

In the case of State v. Carsey, 664 Pa.2d 1085 (Or. 1983), the Oregon Supreme Court rejected the notion that consent by a person with apparent authority was sufficient to justify a warrantless search. Explaining its ruling, the court stated:

> It must be kept in mind that the consent exception is just that - an exception - an exception perched upon the existence of commonality of use, control or occupancy of the searched premises. As stated, consent of a person who under Matlock has no status as a common occupant is, in effect, no consent at all. Such an entry, so far as the defendant is concerned, is identical to an entry in which no consent had been obtained. The defendant's expectation of privacy is the same and the interference with the defendant's privacy is identical in both cases.

Id. at 1094. The court characterized the apparent authority doctrine advanced by the state as "[a]n ignorance is bliss exception." Id.

The Petitioner places substantial reliance on the reasoning underlying the

decision in United States v. Rodriguez, 888 F.2d 519 (7th Cir. 1989) which endorsed the apparent authority doctrine. The reasoning of this decision is flawed and flies in the face of decisions of this Court. The court in Rodriguez asserted that "[t]the question posed by the Fourth Amendment is whether the search is 'reasonable', and it is reasonable to act on the basis of apparent valid consent." Id. at 523. The court appears to have forgotten that the Fourth Amendment "was not enacted for the primary purpose of encouraging police to act in good faith. It was enacted to protect people in their homes against unreasonable, warrantless searches." State v. Carsey, 664 P.2d at 1094. The Rodriguez court feared that requiring actual authority "would make the outcome of the search depend on niceties of property or marital law far removed from the concerns of the Fourth Amendment." Id. at 523. This Court

has, however, clearly rejected any notion that actual authority to search depended upon technical distinctions in property and marital law. E.g., United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). Instead, this determination is based on a general body of jurisprudence arising under the fourth amendment focusing generally on whether the individual has a reasonable expectation of privacy in the place to be searched. Cf. Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980); United States v. Salvucci, 448 U.S. 83, 87 (1980); Rakas v.Illinois, 439 U.S. 128, 143, n.12, 152 (1978). Finally, the Rodriguez court's concern over the delay that would result from investigating the authority of a person who gave consent is overwhelmingly outweighed by the danger that absent such investigation, a home or other privacy interest held sacred by our constitution and society may suffer an unauthorized

intrusion.

The Petitioner's reliance on this Court's decisions in Hill v. California, 401 U.S. 797 (1971) and Maryland v. Garrison, 480 U.S. 79 (1987) is misplaced and fails to justify adoption of an apparent authority doctrine. In Hill, this Court upheld a search incident to an arrest of a man officers reasonably, but erroneously, believed was a different individual for whom they had probable cause to arrest. The decision rested on the rather unexceptional conclusion that probable cause, not certainty, is all the fourth amendment requires. Id., 401 U.S. at 804. In the instant case, the police did not rely upon probable cause to justify their entry into the Respondent's home. There is nothing in the fourth amendment to suggest "probable" consent can justify this intrusion.

In Garrison, this Court upheld the

search of the defendant's apartment that was erroneously included in the description of the place to be searched in a warrant. As this Court's decision in Leon makes clear, the intervention of a detached and neutral magistrate and the searching officers' reasonable reliance on the warrant distinguish Garrison from the instant case.

Any decision fashioning an apparent authority doctrine will have disastrous consequences in police practice and the administration of justice. Once police obtain a colorable consent to search, they will have little incentive to conduct any further investigation to determine whether the person has actual authority. Police will be discouraged from seeking out and confronting persons with actual authority who may withhold consent to search. Police will have little incentive to invoke the warrant procedure. Indeed, where probable

cause is lacking or obtaining a warrant would be inconvenient, police would have substantial incentive to seek out someone lacking in actual authority but whose circumstances might provide them with the appearance of authority.[2] As stated supra, many times, the person with colorable authority will have an interest antagonistic to the person whose privacy interest is being invaded. Permitting consent searches based on apparent authority would encourage police to pray on such a person's antagonism and to take advantage of the person's desire to sabotage the rights of the real person in interest.

---

[2] While a person with actual authority and, hence, an expectation of privacy in the place to be searched would have a natural instinct to withhold consent and protect the privacy interest, a person with no actual privacy interest in a particular place will have little, if any, incentive to demand compliance with the fourth amendment's warrant requirement. Thus, such a person would be far more susceptible to having her will overborne by officers intent on conducting a search.

## II.

## THE "GOOD-FAITH EXCEPTION" TO THE FOURTH AMENDMENT'S EXCLUSIONARY RULE IS WHOLLY INAPPLICABLE TO WARRANTLESS SEARCHES IN WHICH THE POLICE THEMSELVES DETERMINE WHETHER THERE IS LEGAL JUSTIFICATION SUFFICIENT TO UNDERTAKE THE SEARCH.

In the case of United States v. Leon, 468 U.S. 897 (1984) a majority of this Court held that when a detached and neutral magistrate issues a search warrant upon which police reasonably rely in searching for and seizing evidence, the fourth amendment exclusionary rule will not, with some exceptions, bar use of the evidence seized if the warrant is ultimately found to be invalid. The decision was based substantially on the fourth amendment's "strong preference for warrants" and the belief that the exclusionary rule, which exacts a heavy toll on law enforcement, should not be applied where its deterrence purpose is not served. Id. at 913-22.

**Extension of the good faith exception to the case of searches based on a police officer's reasonable reliance on a third party's apparent authority to consent must be rejected. In these cases the searching officers have disregarded the fourth amendment's preference for the warrant procedure. The officer has chosen to pursue a path that places the citizenship of this country at great peril of having their privacy and security interests violated based on arbitrary judgments. Such decisions cannot be rewarded.**

**Additionally, unlike the scenario where the officer relies on the judgment of a magistrate, Leon or the determination of the legislature, Illinois v. Krull, 480 U.S. 340 (1987) in conducting a search that is later determined to be without legal basis, suppressing evidence seized based on an officer's erroneous belief in the authority of the person who consented will**

deter that officer and others from deciding to base a search on the consent of persons lacking authority. As experience has proven, suppression is the most efficacious vehicle to bring police practice in line with the requirements of the fourth amendment.

Based on this reasoning, federal appellate courts have held fast in rejecting application of the good-faith exception to non-warrant searches and seizures. E.g., United States v. Curzi, 867 F.2d 36, 44-45 (1st Cir. 1989); United States v. Winsor, 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc); United States v. Warner, 843 F.2d 401, 404 (9th Cir. 1988); United States v. Owens, 782 F.2d 146, 152 (10th Cir. 1986); United States v. Milian-Rodriguez, 759 F.2d 1558, 1563, n.2 (11th Cir.), cert. denied, 474 U.S. 845 (1985); United States v. Morgan, 743 F.2d 1158, 1165 (6th Cir. 1984), cert. denied, 471

U.S. 1061 (1985). Consistent with these cases and the reasoning underlying its own decisions, this Court must reject application of the good-faith exception to the circumstances of the instant case.

The apparent authority doctrine fashioned by the Petitioner is a mirage created by the use of lights and mirrors. It purports to authorize searches for which no authority to search exists. It creates an illusion of reasonableness while permitting, and even encouraging, the very type of police misconduct the fourth amendment was intended to prevent. Consent searches, of any sort, must still remain the exception to the warrant procedure which interposes a neutral and detached magistrate between the officer engaged in the often competitive enterprise of ferreting out crime and the person whose privacy interest the fourth amendment was intended to protect. Adoption of the

apparent authority doctrine proposed by Petitioner or extending the good faith exception to this non-warrant scenario would constitute an all too dangerous step toward elimination of the warrant requirement and a return to the days when the extent of one's rights depended on the whims of those in power.

## CONCLUSION

For the reasons stated, the judgment of the Appellate Court of Illinois, First District, should be affirmed.

Respectfully submitted,

BENJAMIN S. WAXMAN, ESQUIRE
JEFFREY S. WEINER, ESQUIRE
WEINER, ROBBINS, TUNKEY & ROSS, P.A.
Attorneys at Law
2250 Southwest Third Avenue
Miami, Florida 33129
Telephone: (305) 858-9550

FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of February, 1990, to: ROBERT J. RUIZ, ESQUIRE, The Solicitor General, State of Illinois; TERRENCE M. MADSEN, ESQUIRE, Assistant Attorney General, 100 West Randolph Street, Suite 1200, Chicago, Illinois 60601; and CECIL A. PARTE, ESQUIRE, State Attorney, County of Cook, 309 Richard J. Daley Center, Chicago, Illinois 60602.

WEINER, ROBBINS, TUNKEY & ROSS, P.A.

BY: Benjamin S. Waxman
BENJAMIN S. WAXMAN, ESQ.